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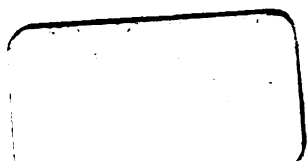
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*Have*

**REPORTS**  
**OF**  
**CASES DETERMINED**  
**IN THE**  
**CIRCUIT COURT OF THE UNITED STATES,**  
**FOR THE THIRD CIRCUIT,**  
**COMPRISING**  
**THE DISTRICTS OF PENNSYLVANIA AND NEW-JERSEY.**  
*COMMENCING AT APRIL TERM, 1803.*

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Published from the Manuscripts of  
**THE HONOURABLE BUSHROD WASHINGTON,**  
One of the Associate Justices of the Supreme Court of the United States.

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**VOLUME III.**

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**PHILADELPHIA:**  
**PHILIP E. NICKLIN, LAW BOOKSELLER.**

PRINTED BY LYDIA E. BAILLY.

1827.

**EASTERN DISTRICT OF PENNSYLVANIA, to wit:**

(L. S.) **BE IT REMEMBERED**, That on the twenty-sixth day of December, in the fifty-second year of the Independence of the United States of America, A. D. 1827, **RICHARD PETERS JUN.** Esquire, of the said District, hath deposited in this office the Title of a Book, the right whereof he claims as Proprietor, in the words following, to wit:

“Reports of Cases determined in the Circuit Court of the United States, for the Third Circuit, comprising the Districts of Pennsylvania and New-Jersey. Commencing at April Term, 1803. Published from the Manuscripts of the Honourable Bushrod Washington, one of the Associate Justices of the Supreme Court of the United States. Volume III.”

In conformity to the Act of the Congress of the United States, intituled, “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.” And also to the Act, entitled, “An Act supplementary to an Act, entitled, ‘An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,’ and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints.”

**D. CALDWELL**, Clerk of the  
*Eastern District of Pennsylvania.*

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## ADVERTISEMENT.

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THE Editor, in presenting this volume to the Profession, begs leave to state, that, contrary to his expectations, the Work cannot be comprehended in less than four volumes. This is the necessary result of the abundance and importance of the matter, contained in the manuscripts of Mr. Justice Washington; and of the length of the judicial period, during which he has, so honourably and so ably, presided in the **CIRCUIT COURT OF THE UNITED STATES, FOR THE THIRD CIRCUIT.**

In this volume, are, the decisions of Judge Washington in the Circuit Court of Pennsylvania, from April Term 1811, to April Term 1814, inclusive; and from April Term 1818, to October Term 1819, also inclusive; and the Cases decided in the Circuit Court of New-Jersey, from April 1818, to October 1820. The intervening Cases are contained in 1 Peters's Reports, published in 1819.—It is not intended to proceed further with the last-mentioned Work; but to

complete the publication of the remaining Cases, decided in Pennsylvania and New-Jersey, in a fourth volume to these Reports; which it is expected will be printed in 1828.

The three volumes of these Reports, with First Peters's Reports, and the succeeding volume of the present Work, will exhibit a series of decisions, commencing in 1803, and ending in 1828. In no portion of the political existence of the United States, have cases of such novelty, interest, and high importance to the Community, been presented before the Courts of the United States, for judicial investigation and decision; and before the Circuit Court, for the Third Circuit, most of the questions of law arising out of these cases, have been first examined and adjudged.

**RICHARD PETERS, JUN.**

*Philadelphia, December, 1827.*

2005P

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## CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1811.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
          { Supreme Court.  
          { Hon. RICHARD PETERS, District Judge.

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### WATSON & HUDSON vs. THE INSURANCE COMPANY OF NORTH AMERICA.

The plaintiffs insured \$12,000 on the *Anna Maria*, from Cadiz to Antwerp, by a valued policy; and the vessel having put into Gibraltar in distress, the captain executed a bottomry bond, which was dated a few days before the policy was made. The jury found the real value of the *Anna Maria* to be \$15,000, and left to the Court the question, whether the amount of the bottomry bond should be deducted from the agreed value in the policy, or the real value. The Court held, that the deduction should be made from the real value, as found by the jury.

A valued policy is in general conclusive, both as to the value of the property, and of the interest that valuation is sufficient to cover; the agreed value being a fixed standard, by which to ascertain the measure of the promised indemnity; but this ceases to be obligatory, if from any circumstances it fails to afford such standard—as where the loss is partial, or the property has, by fraud or accident, been greatly overrated.

Difference between the form of policies of insurance in the United States and in England, as to double insurances.

THE only question reserved by the jury for the opinion of the Court, was, whether the amount of a bottomry bond, ex-

See Vol. II. pp. 152. 480.

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Watson et al. vs. The Insurance Company of North America.

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cuted by the captain, without the knowledge of the plaintiff, beyond sea, a few days before this policy was made, is to be deducted from the 12,000 dollars, the agreed value in the policy, or from the 15,000 dollars, the real value found by the jury?

*WASHINGTON, Justice*, delivered the opinion of the Court. The object of the insured, as well as of the underwriter, is indemnity against loss to the value of the interest of the former in the subject insured. The value of this interest may be agreed by the parties, or if not so, the insured must prove it. This agreement is in general conclusive between the parties to the policy, not of the value of the property at risk, but of the interest which that valuation is sufficient to cover; for the owner may insure different portions of his entire interest with different sets of underwriters, and may after all leave a residuum, of which he stands himself the insurer.

The agreed value being intended, by both parties, to fix a just standard by which to ascertain the measure of the promised indemnity, it of course ceases to be obligatory, if, from any circumstance, it fails to furnish such standard. This happens in every instance where only a partial loss has happened, or where the property has been greatly overvalued. But it is not because of fraud in the overvaluation, that the policy is opened; for if it happen by accident, as by a part only of an expected cargo being put at risk, the insurer is not bound by the agreed value. A double insurance does not necessarily imply an over-insurance, because the aggregate of the sums subscribed may fall short of the real value; and according to the custom of merchants in England, the loss is to be made up proportionally by the different sets of underwriters: but the form of the policies of this city, and probably of most of the cities of the United States, has prescribed a different rule; and it is believed, that by a fair construction of the contract which creates this rule, the present question may be decided.

The agreement is, that if any prior assurance of the same

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Watson et al. vs. The Insurance Company of North America.

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property has been made, the assurers in this policy shall be answerable, only, for so much as the amount of such prior assurance may be deficient towards fully covering the premises insured. Here, the existence of a prior insurance is presumed and admitted; and the second insurer binds himself to make good any deficiency in the first policy towards a full indemnification, so far as his subscription goes. True, it may be said, the second insurer promises a full indemnification, but the measure of that indemnity is the value agreed by the parties, where such an agreement is made. But how can this possibly be? The insured most unquestionably intends to secure an indemnity to the amount stipulated in the second policy, in addition to that secured by the first; and the second insurer, by admitting the possible existence of a prior policy, consents to fulfil that intention, so far as it may be necessary to cover the property insured to the extent of his subscription. But, notwithstanding this, the rule contended for by the defendants in this case, is calculated to deprive the assured of his expected indemnity, by so much as the sum first insured amounts to, should it be less than the value agreed in the second policy; and to render the second policy absolutely null and void, in case the sum first insured should exceed the sum so agreed in the second policy: that is to say, the second insurer is to be understood as declaring, that although his whole subscription may be necessary, in addition to the sum first insured, fully to indemnify the insured, and therefore he pledges himself to that extent, still he will not go to that extent, and in fact will not pay a farthing, if the insured is entitled to receive from the first underwriter a greater sum than the value agreed upon between them, however inadequate that may be to cover the property insured. If ever a rule was contended for, which more palpably violates the obvious and declared intention of both parties to a contract, it is not now recollected by the Court. But it may be asked, why does the insured agree upon the value of the interest at risk, where he has previously insured the same pro-

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Watson et al. vs. The Insurance Company of North America.

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perty, unless it is his intention to be governed by that value? The answer is, that a prior insurance may have been effected abroad, and still more probably, a bottomry bond given, without his certainly knowing the fact. It is as probable that a loss may be partial as total, and yet he agrees to the value, although he knows that in the former case the value will stand for nothing. In the present case, it is agreed that the plaintiffs were ignorant of this bottomry bond, which accounts for the form in which this insurance was made.

Upon the whole, it is the opinion of the Court, that the clause in the policy which has been stated and examined, amounts to an agreement to open the policy, in case a bottomry bond has been given, or a prior insurance made; and that the amount of the bottomry bond, or of a prior insurance, is to be taken out of the real value.



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 Blagg vs. The Phoenix Insurance Company.
 

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**BLAGG vs. THE PHOENIX INSURANCE COMPANY.**

A testamentary declaration of the captain of the vessel, not under seal, taken at Chagres, on the Spanish Main, by the governor *pro tempore*, who is also a judge authorized to take such declarations, there being no notary, and proved to be an original paper, in the usual form, there being no seal at Chagres; was admitted in evidence.

It is no objection to the testamentary declaration being given in evidence, that it contradicts other written papers signed by the captain.

The rule in *Walton vs. Shelly* is not authority in the United States, the case having been decided since the Revolution; and that rule has, since the decision, been much shaken, and it has been held to extend only to negotiable papers.

The bill of lading, and the invoice, are the ordinary evidence of property; but they may be contradicted, both as to their genuineness and authenticity, and as to their truth.

**MOTION** by defendants to continue. It appeared that a similar motion had been before four times made, with success. The affidavit stated no precise evidence expected in consequence of their commission to the Spanish Main, but, generally, that they expected to obtain material evidence under which this had been before sworn to.

*By the Court.* This appears to be a fishing commission, as it has been called elsewhere; and there is no other reasonable way to account for the commission not having been executed, but by supposing that the expected evidence could not be discovered; were we to continue a fifth time, it would amount almost to a denial of justice. The cause must come on.

The policy was on all kinds of lawful goods, laden or, to be laden on board the schooner *Splash*, at and from her port of departure on the Spanish Main, to New-York; premium five per cent.; 10,000 dollars subscribed; policy open, containing

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Blagg vs. The Phoenix Insurance Company.

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try; that it is taken in the usual form, by an officer authorized by law to take it; and is authenticated in the usual way, where there is no college of notaries, and that there is none at Chagres, or at any place within two hundred miles of it; that the officer who took this declaration has no seal, and that there is none belonging to Chagres, a trifling village on the coast; that to an original paper, no seal is or can be affixed.

The objections to the reading of this paper were—First; that as its tendency is to impeach the bill of lading and invoice, signed by the captain, the evidence would be a direct violation of the rule which forbids a witness or any other person, to impeach a negotiable paper, to which he has given credit. Second; that the paper is not properly authenticated, according to our laws.

In support of the evidence, were cited, for the defendants, 7 T. Rep. 601. 611. Chitty, 204. 2 Binney, Baring vs. Shippen.

*Washington, Justice.* Walton vs. Shelly, which gave rise to the rule contended for, was decided long since the Revolution, and is therefore not a binding authority in this Court. In respect to other than negotiable papers, it does not prevail even in England. But take the rule as acknowledged in England, or as it has been on some occasions, though much shaken by later decisions, and it can only apply in cases of negotiable papers, which have been negotiated. For, whilst the dispute is between the original parties, it is impossible to state a rational ground of difference between such a paper and one not negotiable; and so far from the person whose name is on the paper as a witness, or otherwise being incompetent to deny his signature, or otherwise discredit the paper, he seems to be of all men the most proper, and most to be credited.

As to the second objection; this testamentary declaration being taken by an officer of the Spanish government, authorized by law to take and to authenticate it,—being an original paper, authenticated by that officer in the legal and usual way

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*King vs. The Phoenix Insurance Company.*

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practised in that country, to make it evidence in the tribunals of that country,—by an officer who keeps no seal, and of course could affix none,—is proper to be given in evidence. This paper contains the declarations of the plaintiff's agent in relation to the business under his management, and may be read against the principal.

The paper, being read, contained a declaration that he, Ferguson, had sold his outward cargo for 9000 dollars—that of that, he had 2000 dollars in specie on board—that he had 1450 dollars outstanding, in the hands of a person whom he named—and that the remainder of the amount he had laid out in the purchase of cocoa, which the purchaser was to deliver; that the vessel and cargo belonged to the plaintiff, but that he, Ferguson, was one-eighth concerned in both; and that the outward and inward duties yet remained to be paid.

This paper, it was contended, falsified entirely the bill of lading and invoice, and showed them to be spurious; of course there was no evidence of interest, nor any proof that the vessel had sailed on the voyage insured.

*WASHINGTON, Justice*, charged the jury. The insufficiency of the proof of the commencement of the voyage not having been much pressed in the argument, the principal question for the consideration of the jury, is the interest of the plaintiff in the cargo laden at Chagres, and the amount of that interest. This being an open policy, it is essential to the plaintiff's recovery, that he should satisfy the jury fully upon those points. He has produced an invoice and bill of lading of the cargo, supported by the testimony of two witnesses as to the handwriting of captain Ferguson. This evidence is liable to be contradicted by other evidence, both as to the authenticity and genuineness of the papers themselves, and as to their truth. They have been attacked upon both grounds. To prove them not genuine, the handwriting of captain Ferguson to other papers, has been proved, and in part admitted; and you

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Blagg vs. The Phoenix Insurance Company.

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are left to test those now offered in evidence, by comparison of hands. This is an important part of the cause, and you will decide the fact upon the whole of the evidence laid before you.

But though you should be satisfied that these papers were signed by the captain, yet the verity of their contents is disputed; and in support of the objections to them, the testamentary declaration of the captain is relied upon. This paper is entirely at variance with those offered by the plaintiff. The latter are dated on the 20th of September, and state the cargo to have been taken on board, and to amount in value to upwards of 14,000 dollars. The former is dated the day after, and states that only 2000 dollars were then on board, that 1400 dollars were outstanding, and that the cocoa purchased with the 6600 dollars was then to be delivered. Both cannot be true: you may credit which you please, or may disbelieve both on account of their contradiction, except as to the 2000 dollars in specie, which is proved by both. But at all events, you must be satisfied of the fact of interest, and the amount for which you may find your verdict.

*Verdict for plaintiff for his full demand.*

THE UNITED STATES *vs.* MORGAN & FARQUHAR.

Where a bond had been taken by the collector, by which the obligor stipulated to reland a cargo, on board a particular vessel, in the United States; although the same might be prevented by the perils of the sea, and stipulating that a certificate of the landing of the cargo should, within a limited time, be delivered to the collector of the port of Philadelphia, to whom the bond had been given; the Court held the bond void, the embargo laws not authorizing the insertion of such stipulations.

THIS was an action of debt, brought upon an embargo bond, dated 24th December 1807, taken to the United States. The plea, to which there was a demurrer, presented the following objections to the bond, which, it was contended, avoided it:—

1. That the collector, and not the United States, should have been the obligee. 2. That the condition of the bond omits to insert the words, "*dangers of the sea excepted.*" 3. That it binds the defendants to deliver to the collector at Philadelphia, where the bond was taken, the certificate of relanding in the United States, within three months from the date of the bond.

Cases cited by the defendants: 3 Vin. 420. Pl. 18. 21. 6 East, 110. 3 Mass. Rep. 105. Cowp. 26.

WASHINGTON, *Justice*, delivered the opinion of the Court. The bond upon which this action is founded, is a statutory instrument, taken to *the United States* by one of its officers, which the Court admits to have been proper. But, as that officer had no authority to take such a bond, but in virtue of a power conferred upon him by the government of the United States, the power should have been, at least, substantially pursued. The embargo law, under which this obligation was taken, does not set out, in precise terms, the form of it; but the material parts of it are clearly prescribed. It is to be in a sum of double the

value of vessel and cargo, with condition that the goods shall be relanded in some port of the United States, dangers of the sea excepted. If it be taken in a greater sum than the law directs;—if the condition stipulate a relanding elsewhere than in the United States;—if it stipulate a relanding absolutely, when the law requires it to be done on a certain condition;—or if it bind the obligors to do more than the law requires—it is not the bond which the officer was authorized to take, and all is void. A contrary doctrine might be productive of the most intolerable oppression to the citizen, as well as of detriment to the government. The Court will not say, that if such a bond be *voluntarily* given, it would on that account be valid. But there is no ground for saying that the bond in question was voluntarily given, since the reverse is stated by the defendants, and admitted by the United States.

Applying the above principles to this case, the bond is void;—first, because the condition is to reland the cargo within the United States, although the obligors might have been prevented from doing so, by a peril of the sea; and secondly, because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time, whereas the law did not impose upon the obligors the necessity of returning the certificate to that officer at all, much less to do so within any prescribed period.

*Demurrer overruled, and judgment for defendants.*

**WARNER & WIFE vs. HOWELL & WIFE.**

Where, in a will, a power has been given, and there has been a complete execution of it, and something added which is improper, and inconsistent with the purpose of the power, the execution is good, and the excess is void.

*Aliter*, if the boundaries between the excess and the execution, are not distinguishable.

Courts always lean in favour of the execution of the power, if it can be supported, even if it should disappoint the person executing the power.

**SAMUEL HOWELL**, by will, devised as follows:—"I give and bequeath to my granddaughter Elizabeth Douglass, the sum of £4000 Pennsylvania currency, to be placed out and kept at interest by my executors, on good real security, and the interest to be paid her annually till her marriage, when she is to receive the principal sum; and, in case of her death, she shall have the right by will, to bequeath the said sum unto whichever of my grandchildren she shall think proper, but unto no other person whatsoever; and in default of such will or disposal, I do bequeath the said sum of £4000, to be equally divided between my six grandchildren, [by name,] and their heirs, &c.; provided, that if my said granddaughter Elizabeth Douglass gets married, then the said legacy belongs to her and her heirs, to dispose of as she may think proper."

Elizabeth Douglass, not having been married, duly made her last will and testament, and after reciting the above devise, proceeds thus,—“in execution of that power, I will and bequeath to my dear cousin Elizabeth Howell, who is a grandchild of my said grandfather Samuel Howell, the said sum of £4000; and it is done with a dying request and hope, that she will give a part of it to my executor; viz. 4500 dollars, within two



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 Warner & Wife vs. Howell & Wife.
 

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months after my decease, or as soon as she can get possession of the money; which sum of 4500 dollars, is to be disposed of as follows, &c, [and then distributes this sum amongst different persons, not the granddaughters of Samuel Howell.] But in case my said cousin Elizabeth Howell, shall decline to comply with this request, then, and in such case, I will the said £4000 to my cousin Elizabeth Stretch, also a grandchild of the said Samuel Howell, with a like dying request, that she will comply with the above request made to Elizabeth Howell."

The complainant, Elizabeth, the wife of the other plaintiff, is the devisee and appointee, named in the will of Elizabeth Douglass, by the name of Elizabeth Howell.

For the plaintiff, it was contended, that she is entitled to the whole £4000, the appointment to her being good, and the condition void. But if the 4500 dollars should be considered as a devise over of that sum, and not a qualification of the whole sum, then, the plaintiff is entitled to the residue under the appointment, and to her proportion of the 4500 dollars, as so much undisposed of. Cases cited, 2 T. Rep. 341. 2 Vez. 641. *Alexander vs. Alexander*. Pow. on Powers, 346. 361. 363. 2 Vez. Jun. 336. 356. 698.

On the other side, it was contended, that the whole devise is void, because the appointee, to take at all, must do so on the terms it is given; and, as she cannot do this, then the power is not executed. Cited 1 Wils. 224.

*WASHINGTON, Justice*, delivered the opinion of the Court. The rule laid down in *Alexander vs. Alexander*, as well as in other cases, is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, the execution is good, and only the excess void; otherwise, if there is not a complete execution of the power, where the boundaries between the excess and execution are not distinguishable. To illustrate the rule, the Master of the Rolls puts the case of the devisee under the power annexing a condition to

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the appointment, that the appointee should release a debt owing to him, or pay money over, where the appointment would be absolute, and the condition only void. The rule, with the illustration, is decisive of the present case. The condition annexed to the devise to Elizabeth Howell, is perfectly distinguishable from the devise of the £4000 to her, which is complete, and consequently, the excess only is void. We take the reason of the rule to be this, that the appointee under the power, takes under the first divisor, and not under the person appointing; and that by naming the person intended to take, the power is executed, and every thing beyond that which is inconsistent with the power, is void. The leaning of the Court is strongly in favour of the execution of the power, if it can be supported, even though it should disappoint the intention of the person executing the power. Of this, there is a strong proof in the principal case before mentioned, where the whole interest devised for the support of Francis, *his wife and children*, is declared to vest in Francis alone, by supplying the words "if the wife and children shall by law be capable."

It was contended, in this case, that if the whole devise to Elizabeth Howell is not void, still it is to be construed as a devise of 4500 dollars to the persons to whom it is given by the will of Elizabeth Douglass. But there is certainly no ground for this. The condition cannot be void, so far as it qualifies the devise to Elizabeth Howell, and yet good as a substantive devise to those persons of 4500 dollars; more particularly, as such a construction would be to create a devise to persons incapable of taking, for the purpose of defeating the execution of the power in part, and to leave such part undisposed of. We are therefore of opinion, that the plaintiffs are entitled to a decree for the whole sum of £4000, with interest.

## THE UNITED STATES vs. DIXEY, COXE, &amp; PRICE.

Want of seaworthiness, in a vessel sailing under a bond given according to the provisions of the Embargo Law, may or may not, according to circumstances, deprive the obligee of the excuse of prevention from performing the voyage, *by the perils of the sea*. If the vessel be lost before she arrive at her port of destination, or at another port in the United States, the obligors would be excused, whether she was seaworthy or not. If the vessel proceeded to a foreign port, from want of seaworthiness, it may afford strong presumption that it was not the real cause of her so doing, but that a breach of the condition was originally intended.

**ACTION** on an embargo bond. The question of law, was, whether the want of seaworthiness of the vessel, does not deprive the obligor of the benefit of the excuse of prevention, by danger of the sea, or other unavoidable accident. The voyage was from Philadelphia to New-Orleans; and in consequence of the disabled state of the vessel, she was obliged to put into Havana, whence the defendant was not permitted by the governor to take away the cargo.

In the charge, it was stated that want of seaworthiness might or might not have this effect. The case is to be considered in reference to the object and intention of the law, which was, to prevent a vessel going to a foreign port. If, for instance, the vessel should be lost before she reaches the port of her destination, or any other port in the United States, it would not deprive the obligor of the benefit of the exception of loss by a peril of the sea, to prove that she was not seaworthy. If she should go to a foreign port, though in consequence of a peril of the sea operating as the immediate cause, the want of seaworthiness might or might not be important, according to circumstances. It may afford strong ground of suspicion, that the

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The United States vs. Dixey et al.

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avowed destination was not *bona fide*, and that the excuse was a mere cover to a breach of the law; as if the vessel is not sufficiently provisioned for the avowed voyage, and, on that account, called at a forbidden port. But this intention may be repelled. In this case, the voyage was one which the defendant was accustomed to carry on, and which had been performed to New-Orleans only the year before, in the same vessel. It is very improbable, that he would risk so large a cargo in a vessel which he did not deem sufficient to carry it safely, and he could not calculate her condition so nicely, as to think her sufficient to go to Havana, and not to New-Orleans. Besides, the immediate cause of her incapacity to proceed, arose from her striking on the Bahama Bank. The question is, was the breach of the condition of the bond produced by a peril of the sea, or unavoidable accident—or merely from the fault of the defendant? If the former, the verdict should be for the defendant, if the latter, against him.

*Verdict for defendant.*

## GREEN vs. SARMIENTO.

The defendant was discharged by the Bankrupt Law of Teneriffe, in 1801. In 1796, a suit was instituted against him and another, in New-York, by *capias*; and a judgment was obtained against him, on the verdict of a jury, in 1797. This suit was instituted upon the judgment, to which he entered the plea of bankruptcy, and a discharge by the laws of Teneriffe, subsequent to the rendition of the judgment.

The law of the country where a contract is made, is the law of the contract, wherever performance is demanded; and the same law which creates the charge, will be regarded, if it operate a discharge of the contract.

To support the plea of bankruptcy in this case, the defendant is bound to show that the contract was originally made at Teneriffe.

The Constitution of the United States, intended to vest in Congress the full power to declare the judgments of one state Court conclusive in every other; and the "Act to prescribe the mode in which the public acts, records, and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state," has declared, not that they shall have full power and conclusive effect, but that they shall have *such* effect, in every other state, as they possessed in the state whence they were taken.

The judgment obtained against the defendant in New-York is conclusive, and extinguishes the original contract; and the discharge of the defendant in Teneriffe, is no bar to this action.

**THIS** was an action of debt, brought on a judgment recovered in the Mayor's Court of New-York, in an action of *assumpsit*, against the defendant and Mahony, as partners, laid to have been made at Madeira. Pleas, *nil debet* and bankruptcy of defendant in 1801, and certificate of discharge at Teneriffe.

By the New-York record, it appears, that the *capias ad respondendum* was executed upon the defendant, but not on Mahony. The defendant entered an appearance by counsel.

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in 1795, and pleaded *non assumptit*. In 1796, he was called, and not appearing, a jury was empannelled to try the issue, who found a verdict for the sum now demanded, and in 1797 judgment was entered.

The bankruptcy of the defendant, and the proceedings against him, according to the law and usage of Spain, in the island of Teneriffe, in 1801, and his certificate and discharge, were fully proved.

For the plaintiff, it was argued—1. That it is not to be presumed that the original contract was at Teneriffe, or in a country subject to Spain; and that to make the proceedings at that island operate as a discharge, it was necessary for the defendant to prove this fact. Dougl. 1. 1 East, 6.

2. That though it were made at Teneriffe, still, the judgment merges the original contract, and affords a new consideration for the *assumptit*, even though the judgment should be considered as only *prima facie* evidence. 6 Rep. 44. 6.

3. But most certainly so, if the judgment be conclusive; and that the constitution and law of Congress (vol. 1. p. 115.) make it conclusive. 2 Dall. 302.

All these points were controverted by the defendant, and the cases below were cited: 2 Ld. Kaimes' Equity, 367. 365. 374. Campb. 63. 1 Caines' N. Y. T. Rep. 460. 1 Johns. N. Y. Rep. 424. 1 Mass. Rep. 401. 1 Dall. 191. 261. 5 East, 124. Coop. Bank. Law, Appen. 27. 30. 1 Dall. 239. 6 Johns. N. Y. Rep. 287. 5 Idem. 132. 9 East, 192. 5 Johns. 37. Coop. B. L. 361 to 373. 8 T. Rep. 609.

WASHINGTON, Justice, charged the jury. We shall consider the validity of the plea of bankruptcy and discharge at Teneriffe—1. In relation to the original debt, independent of the judgment on which this action is founded—and 2. As it may affect that judgment.

First. The rule is, that the law of the country where a contract is made, is the law of the contract, wherever perform-

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ance is demanded; and the same law which creates the charge, will be regarded, if it operate a discharge of the contract. The laws of one country can have in themselves no extra-territorial force, except so far as the comity of other nations may extend, to give them effect; and where is the nation that will, or ought to acknowledge the validity of foreign laws, legislating over persons not within the jurisdiction of such foreign country, and affecting contracts not entered into elsewhere, and with a view to other laws? It is said that France acknowledges the binding force of foreign bankrupt laws, to discharge the foreign debtor from all his contracts, wherever made. If this be so, we can only say, that the comity of that nation is marked by a whimsical, and we think, irrational opposition, to that which obtains in most other countries. She disregards the decisions of foreign *prime Courts*, so far as they affect the subjects of France, although they are Courts of the law of nations, and although all the world are *nominal* parties to the causes they decide, and the captor and captured are in reality the immediate parties; and yet she submits to foreign *municipal* laws, affecting the interests of French subjects, upon the ground of a mere fiction, which, in reality, favours only the subjects of the country where the law operates, to the unjust exclusion of her own subjects.

It is said, that the rule observed in the state of Pennsylvania, is different from that which is approved by the Court as the general rule; and to prove this, the case of *Miller vs. Hall*, has been quoted and relied upon. In the case of *Banks vs. Greenleaf*, decided ten or twelve years ago in the Circuit Court of Virginia, upon the ground that a contract made in Virginia, was not discharged by the Insolvent law of Maryland; *Miller vs. Hall* was cited. It was then, and continues to be, our opinion, that that case is consistent with the rule before laid down; the debt having accrued at Baltimore, where the goods were sold and the money received.

If, then, the general rule be correctly stated, it is essential

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to the support of the defence set up in this cause, in relation to the original contract, to prove that it was made at Teneriffe, or in some place governed by Spanish laws. No direct proof of this fact has been given, and certainly the circumstance of the defendant having generally resided at Teneriffe, from the year 1790, to the year 1810, furnishes a very slender ground for presuming it. Occasional absences have been admitted, at which times the contract in question might have been made at Madeira; or it may have accrued there although the defendant had never left the island of Teneriffe; since it does not appear where Mahony, the other partner, lived; and since the debt might have been contracted in a variety of ways at Madeira, though both partners had always resided at Teneriffe. If, then, this debt was not contracted at Teneriffe, the cause is against the defendant, independent of any change produced by the judgment; but as it is possible the jury may not view the evidence in the light it is seen by the Court, it may be necessary to consider the second point; which is, did the judgment so far alter the nature of the original contract, that it could not be discharged by the proceedings at Teneriffe, on the bankruptcy of Sarmiento?

It is contended by the counsel for the plaintiff, that the original contract is so completely extinguished by the judgment, that it cannot be noticed in reference to any question to which it might previously have given rise, and therefore that the debt must be considered as having accrued under the judgment in the state of New-York. This is certainly true, where the judgment is conclusive and unexaminable, in a Court of coordinate jurisdiction; nor does the Court mean to intimate, that the rule would not be the same, in a case where the judgment is only *prima facie* evidence of a debt. But since this latter point has not been considered, and the Court is prepared to give an opinion upon the great question which has been discussed, of the conclusiveness of a judgment of a state Court in every other state of the Union; it is thought best to decide



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it now, that the point may be put at rest in this Court, as well as elsewhere, in case it should be deemed proper to take the opinion of the Supreme Court upon it. We never expect to hear the question more ably argued.

The first section of the 4th article of the Constitution of the United States, declares that "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, *and the effect thereof.*" This section has three distinct objects: 1. To declare that full faith and credit shall be given, in each state, to the records, &c. of every other state. 2. The manner of authenticating such records, &c.; and 3. Their effect, when so authenticated. The first is declared and established by the Constitution itself, and was to receive no aid, nor was it susceptible of any qualification, by the legislature of the United States. The second and third objects of the section were expressly referred to the legislature of the Union, to be carried into effect in such manner as to that body might seem right; and it will presently be seen, how very correct this reference was.

That the intention of the Constitution to invest Congress with the power to declare the judgments of the Courts of one state conclusive in every other, and even to clothe them with a still more extended force and effect, corresponded with the strong and unambiguous expressions used in this article, will appear from the following considerations: 1. It is presumable that the enlightened framers of that instrument knew, that by the general comity of nations, and by the long-established rules of that country whose decisions were once of binding authority in the United States, and to a certain period were still observed and adopted, a foreign judgment might be made the foundation of an action here, and was, *prima facie*, evidence of its own correctness. It is highly probable, therefore, that the Constitution intended something more than merely to recognise an

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 Green vs. Scurmont.
 

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established rule of law, which, without such a declaration, would allow in each state, at least as much faith and credit to the judgments of a sister state, as to those of a country foreign to the United States. If nothing more was meant, the provision was certainly unnecessary. It would, on the contrary, seem more natural, that the Constitution, which was intended to "form a more perfect union," and a more close and intimate connexion of the states, than had existed under the confederation; would consider the judgments of the several states in relation to each other, as domestic rather than foreign judgments.

2, The change of the language of this section of the Constitution, from the parallel section of the articles of confederation, affords a strong reason for the opinion, that the former was intended to give to the judgments of each state, within the other states, a more extensive force and effect than the rule of law, founded on mere comity, had allowed to foreign judgments.

The fourth article of the confederation goes no farther than to declare, that "full faith and credit shall be given, in each state, to the records, acts, and judicial proceedings of the Courts and magistrates of every other state;" whereas, the Constitution proceeds to add, that Congress may declare what shall be the effect of such records, acts, and judicial proceedings. And what reasonable objection, let us ask, can be offered against extending to the judgments of each state, in every other state, the rule which is applicable to domestic judgments within the same state? Does it consist with the peace of society, with the interest or security of individuals, that a question which has once been fairly tried and decided, should be litigated again and again, before other tribunals of co-ordinate jurisdiction, as often as one of the parties may choose to withdraw himself from the jurisdiction of the state where the decision has been made? Is it right to open again the door of litigation, which has once been regularly closed, and to re-examine the original cause of action, when, possibly, by the death or absence of witnesses, or the loss of other testimony, the justice

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of the case can no longer be reached? But it is objected, that the judgment may be unjust upon the merits of the case, or erroneous in point of law—and ought such a decision, it is asked, to be submitted to in the Courts of another state? We answer, that the contrary of all this ought to be presumed—and let us ask in return, which is the state that stands so pre-eminent for virtue and knowledge, as to say with confidence, that the judgments of her Courts would be more just, or more consonant to law, than those of her sister states? We admit that the supposed case, upon which the objection is founded, may sometimes happen; but we are far from conceding, that in all cases the evil would be remedied by a re-examination of the cause before another tribunal, in another state; and the general good forbids that this should be done.

We now proceed to inquire, in what manner Congress exercised the power confided by the above section of the Constitution to that body. As a key to the intention of the legislature, the title of the law which is now to be examined, deserves peculiar regard. The will of the people, expressed in the section of the Constitution before mentioned, remained unfulfilled until Congress should have made provision respecting the two objects which that section had referred to them; and the title declares, in explicit terms, the determination of that body to act upon both. The words are, "An Act to prescribe the mode in which the public acts, records, and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state." The law then proceeds to make provision for the first of these avowed objects, by prescribing the mode of authentication, and then declares, that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage in the Courts of the state from whence they shall be taken."

It has been contended that this latter sentence, (for there are but two in the enacting part of the law,) means no more than

that full faith and credit shall be given to the record so authenticated, as evidence that such proceedings were had, and such judgment rendered, as the record imports. But the sentence does not go so far as this; for it does not give full faith and credit, but *such* faith and credit as the record has in the state from whence it is taken. Now, Congress had no authority to declare that full faith and credit should be given to such public acts and records, as a matter of evidence; because the supreme law of the land had already pronounced upon that subject; and a similar declaration, by this subordinate body, would have been idle, if not mischievous. If this sentence meant to qualify and restrain the credit to which such evidence is entitled under the Constitution, by referring it to the rule of the state laws and usages, then such intention would be a palpable violation of the Constitution, which gave to such evidence full faith and credit. It is impossible, therefore, to rescue the legislature from the charge of folly or usurpation, but by confining the last sentence of the law to one of the two objects referred to that body by the Constitution; and since the mode of authenticating public acts and records had been provided for by the first sentence, the conclusion is inevitable, that this sentence was intended, and could only have been intended, to declare the force and effect to be given to records and judicial proceedings, when so authenticated. Under this view of the subject, the power to limit the effect of such judicial proceedings, is undoubted; and it was wisely left to the discretion of Congress, to regulate the degree of force to be given to such proceedings. For, if the Constitution or the law had declared, generally, that the judgments in one state should be conclusive in every other, very embarrassing questions would have arisen, as to the degree to which they were conclusive. If not conclusive in the state where the judgment was rendered, it might have been attended with mischievous consequences, to declare them so in other states. In some of the states, perhaps, judgment upon an attachment may be conclusive only as to the thing attached; in others, it may

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be so as to the matter decided, and to operate against the person and estate of the defendant generally. In others again, the judgment may be so far inconclusive, that it may be opened and examined, upon the performance of certain conditions, within a limited period. The present case affords a strong illustration. The judgment is against Sarmiento & Mahony, although process was not served on the latter, nor did he appear, or take defence. Is the judgment, by the law of New-York, conclusive as to Mahony?—possibly it may be so, upon the ground that it was a partnership transaction, and that as one partner may bind, so he may defend his associate. But a different course of reasoning might prevail in other states, and the law might consider it as only *prima facie* evidence, or no evidence at all, against the defendant, who was not served with the process. These, and a variety of other cases which might be put, show the wisdom of the legislature, in giving to such judgments, only such credit, as they possess in the state where they were rendered.

Now, let me ask this question, of those who deny the conclusiveness of the judgment. If a Court in Pennsylvania, should declare that a judgment of a New-York Court, is evidence only that such a judgment was rendered, and that the same is only *prima facie* evidence that a debt is due or not due, does that Court give as much faith and credit to such judgment, as is given to it by the laws and usages of the state of New-York; which pronounce it to be evidence, and conclusive evidence, not only of the existence of the judgment, but of the right which it has decided? If, then, you deny to such judgment the force and effect given to it by the laws of New-York, you deprive it of the same faith and credit, which the same laws attribute to it; and, in truth, the latter expressions, as used in the Act of Congress, are synonymous with the former.

Nothing remains, but to answer some of the objections made to this construction. It is said, first, that the judgment which thus claims an exemption from re-examination, may have been

*ex parte*, the defendant having had no opportunity to make his defence. If the law of the state does not sanction such an outrage upon the immutable dictates of justice, then the Court, which inadvertently gave the judgment, or a superior Court, would provide the remedy. If the law or the Courts should leave the injured party without a remedy, we will not say, (because in this case it is unnecessary,) whether the Courts of another state would be bound to consider such a judgment as conclusive or not. But if they should be so bound, then we can only say, that the Act of Congress was not passed with sufficient consideration, and that it may, and ought to be amended, as to give a conclusive effect to judgments, only in cases where the trial was perfectly fair, and where both parties were, or might have been heard. But the supposed case, although it might form an exception, furnishes no just ground of objection to the rule itself.

Second objection. The judgment on which this action is founded, was *ex parte*, erroneous, and unjust. Answer. There is no foundation for the complaint that the judgment was *ex parte*, because the defendant was served with process, and plead to the action. If the judgment be erroneous, it would doubtless have been reversed, if the defendant had thought proper to carry it before an appellate Court. If the plaintiff's claim was unfounded, for which, by the bye, we have only the defendant's assertion, he has no one but himself to blame, for not having proved it so at the trial of the cause.

Third objection. If the judgment is to have such effect in this state, as it has in the state of New-York, it would create a lien on lands lying in this state; an execution might issue from the Mayor's Court; where the judgment was rendered into this state, or a *scire facies* might lie. These, if they be evils, are altogether imaginary. The judgment, of itself, has no extra-territorial force; the laws of New-York can give it none, nor does the Act of Congress give it. The Courts of the other states are enjoined to give such faith and credit to it, as it is en-

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Green vs. Sarmiento.

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titled to in the state of New-York. If it be conclusive evidence of the right it establishes in the Courts of New-York, it is conclusive here; and this is all that the Act of Congress requires. But there is no doubt in our mind, that Congress may give to the judgments of one state, all the effect which it is complained may follow from the rule laid down by the Court; and we confess, that we can see no good reason, why such an effect may not in part be given.\* Why ought not an execution to issue upon a judgment rendered in one state, against the person and effects of the defendant found in any other? It is unnecessary, however, to meet the policy of the measure, which must rest with Congress, in its wisdom, to adopt, if it should seem right to that body to do so.

Upon the whole, it is the opinion of the Court, that this judgment is conclusive, and amounts to a complete extinguishment of the original contract, wherever it might have been made; and consequently, upon the rule first laid down, the bankruptcy, certificate, and discharge of the defendant at Teneriffe, afford no bar to the plaintiff's present demand, and your verdict ought to be for the plaintiff.

*Verdict for plaintiff.*

**Montford vs. Hunt.**

The plaintiff had filed a bill on the equity side of the Circuit Court of Georgia, against the defendant, in which he sought relief from a judgment obtained against him upon a promissory note drawn by him, claiming that the amount of the note had been paid by the endorser, against whom a suit had been instituted in a state Court in Pennsylvania; and who, having been taken in execution under a *copias ad satisfaciendum*, gave the plaintiff certain securities, (afterwards found of no value,) and was then discharged from the execution. The bill was dismissed in Georgia; and the plaintiff having paid to the defendant the amount of the judgment, instituted this suit to recover the sum paid by him, on the ground, that the discharge of the endorser from execution, was a satisfaction of the debt. Held, that the decree of the Circuit Court of Georgia, was conclusive on the plaintiff; the same facts, as those now relied upon, having been before that Court, or which might have been submitted by the plaintiff in the bill, to the consideration of the Court, at the time of the proceeding.

**THE** case was as follows: The defendant recovered a judgment against the plaintiff in the Circuit Court for the district of Georgia, upon a promissory note given by Gibson to Young, endorsed by Young to the plaintiff, and by the plaintiff to the defendant. At the same time, the defendant commenced an action in the state Court of Pennsylvania against Young; recovered a judgment, and issued a *copias ad satisfaciendum*; upon which Young was taken, and afterwards discharged by the defendant from custody, upon giving to the defendant certain securities, which, however, produced no actual satisfaction of any part of the debt.

The plaintiff filed a bill, on the equity side of the Circuit Court of Georgia, stating that the defendant had received satisfaction of his debt from Young, and obtained an injunction to the judgment at law. The discharge of Young, out of execu-



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Montford vs. Hunt.

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tion, was not known to the plaintiff, nor set forth in his bill; nor is it stated in the defendant's answer, but was fully proved by the deposition of Mr. Dupondau, taken in the cause. The injunction was dissolved on motion, and the cause coming on to be heard, the Court decreed that the judgment obtained by the defendant at law, against the plaintiff, had not been satisfied, and dismissed the bill. From this decree, Montford appealed to the Supreme Court of the United States, but not prosecuting the same, it was dismissed. Having paid to the defendant, the amount of the judgment obtained against him in the Circuit Court of Georgia, the plaintiff brought this action to recover it back, as money had and received; upon the ground, that the discharge of Young out of execution by the defendant, was a satisfaction of the debt, in like manner, as if Young had paid the money; and besides, that the securities assigned by Young to the defendant, should be considered as a satisfaction, though afterwards given up. It appears, that the whole subject, as urged by the plaintiff in this case, was in evidence before the Circuit Court of Georgia, in the equity suit.

Dallas and J. R. Ingersoll, for the plaintiff, contended—1. That the discharge of Young, out of execution, was equivalent to satisfaction by a prior endorser, and consequently, that the payment by the plaintiff to the defendant, was so much money received to his use,<sup>2</sup> which the defendant could not conscientiously retain.

2. That the decree on the equity side of the Circuit Court for the district of Georgia, was not conclusive, not being a case within the first section of the fourth article of the Constitution; and if it is open to examination, it will appear that the Court mistook the law.

3. If these points be established, then, upon the case of *Moses vs. M'Farlain*, an action at law will lie, to recover money, erroneously paid under the judgment at law.

The Court stopped Mr. Ingersoll, for the defendant.

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*Submitted to Court.*


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*WARREN, Justice.* The case is too clear to admit of an argument. Even if an action for money had not been received, would lie, to recover back money paid under a judgment unreversed and in full force, which the Court by no means admits; still, the plaintiff has selected another remedy, and another jurisdiction to try his rights and the question now submitted to this jury, is in all its parts the very same which was brought before the equity side of the Circuit Court for the district of Georgia, where it received a final decision. If the plaintiff, from ignorance of facts, did not state his case properly in his bill, the deposition of Mr. Duponceau contained a full disclosure of all the facts necessary for him to know, and he might then have amended his bill, if he had thought it necessary. If the Circuit Court erred in the opinion on which the decree was founded, the plaintiff had his remedy by appeal, which he first took, and then abandoned. This decree, then, is conclusive between these parties; for it would be a strange anomaly in the jurisprudence of this country, if the judgment of a state Court, should be conclusive in every other state, and yet, that the judgment of a Circuit Court, sitting in one state, should be considered as a foreign judgment in another state, and examinable before a Circuit Court sitting there, or before a Court of that state.

*Plaintiff agreed to be called.—Norton.*

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MUNN vs. Dupont et al.

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## MUNN vs. DUPONT DE NEMOURS &amp; PETER BAUDUY.

Action for damages, for a malicious prosecution—1. In charging the plaintiff with having stolen certain articles used in the manufacture of gunpowder, and causing the plaintiff to be imprisoned thereon. 2. In bringing a civil action against the plaintiff, and demanding excessive bail. 3. In causing the plaintiff to be indicted in the state of Delaware, as the receiver of certain articles used in making gunpowder, knowing them to have been stolen; all of which charges were alleged to have been maliciously made, and without probable cause.

Of the malice of a charge which is the ground of a prosecution for a crime, the jury are exclusively the judges. Probable cause for such a prosecution, is a mixed question of law and fact. What circumstances are sufficient to prove a probable cause, must be decided by the Court; but to the jury it must be left to decide, whether these circumstances are proved by credible testimony.

Probable cause, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused was guilty.

The declaration stated, the writ on which the plaintiff was held to bail in \$6000, to have been returnable the first Monday in December 1809, whereas it was returnable the first Monday in March 1809: held, that the record does not support the declaration, and cannot be given in evidence to support the count in the declaration for damages for the civil action, and holding to bail, but it may be used as evidence of malice, on the other counts.

A letter from P. which went to show the plaintiff had not seduced him from the service of the defendants, was not admitted in evidence, as the testimony of P. might have been obtained.

A joint commission to take a deposition must be executed by all the commissioners, although the commissioner named by the party against whom the witness is offered, after proceeding some length in the examination, withdrew, and refused to complete it.

Papers taken from the person of the party, by the alderman before whom he was brought upon a criminal charge, the parties making the charge

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*Stamm vs. Dupont et al.*


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having no agency in taking the papers, they be read in evidence by those who have possession of them, having received them from the alderman. The subscribing witness to a paper, who stated that he was called in to sign the paper as a witness, but did not see the parties execute, or acknowledge it, although they both told him it was their agreement, was admitted to testify.

**THIS** was an action for a malicious prosecution—1. In charging the plaintiff before Alderman Keppele in Philadelphia, with having stolen a brass pounder, and three draughts of machinery; and causing the plaintiff to be imprisoned. 2. In bringing a civil action, and demanding excessive bail. 3. Causing the plaintiff to be indicted in the state of Delaware, as the receiver of five pieces of parchment sieves, knowing them to have been stolen. All charged to have been done maliciously, and without probable cause.

The circumstances of the case which are at all important, will appear in the charge.

*WASHINGTON, Justice.* The plaintiff, having some skill in the mystery of making gunpowder, engaged with Brokers, Page, & Co. of Virginia, in November or December 1800, to superintend a manufactory of that article, which they were about to establish near to Richmond; and with a view to obtain more complete information of the art than he then possessed, or to procure workmen, or certain parts of machinery, he came to the northward early in December. On the 9th, he put up at an inn called the Buck, within half a mile, or thereabouts, of the powder manufactory of the defendants, on the Brandywine. The powder of this manufactory had obtained great celebrity, and commanded the market, in consequence of the skill employed in making it, and probably from the use of certain parts of the machinery employed, particularly the parchment sieves. The plaintiff, immediately after his arrival at the Buck, opened a correspondence with some of the defendants'

workmen, and had frequent interviews with them at the tavern, at which times he made them considerable offers to induce them to leave the service of the defendants, and to go to the manufactory at Richmond. He also made them pecuniary offers, to procure for him patterns or models of the different parts of the machinery used by the defendants, and particularly to procure for him a sight of one of the brass pounders, or a pattern of it.

The defendants, hearing of the plaintiff's conduct, called upon him at the tavern; and after offering considerable violence to his person, ordered him to quit the neighbourhood, which he did on the 14th. It is proper to remark, that pains were taken by the defendants to preserve the secrets of their art, and that strangers were not, without leave, admitted into the factory. Shortly after the plaintiff had left the neighbourhood, two of the defendants' workmen secretly went off, and at the same time, one of the brass pounders was missing. The plaintiff came to Philadelphia, and a few days afterwards, the defendants arrived here. On the 22d, they applied to Al-  
 fonsus Keppels, for the warrant stated in the first count of the declaration, and, on their oath, valued the property charged to have been stolen, at 10,000 dollars. The officer to whom the warrant was delivered, met with the plaintiff the next day, and inquired of him, if his name was not Munns? The plaintiff denied it, and assumed a fictitious name. The officer, however, being satisfied that he answered the description, carried him to the house of the high-constable, where he acknowledged himself; and after he was informed of the nature of the charge against him, he put to the officer this question:—"If I was in the company of one who had stolen certain articles, am I guilty?" The officer declined giving an answer, and conducted his prisoner to the office of Mr. Keppels. There he was examined, and by order of the alderman, his person was searched; when certain letters were found in his pocket-book, from him to Brown, Page, & Co., and from them to him; by

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Munns vs. Dupont et al.

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which it appeared, that the plaintiff, previous to his arrest, knew that the defendants were in Philadelphia, and suspected that they were following his steps—that he had obtained all the information he wanted, to enable the Richmond, to equal the Brandywine powder manufactory; and that some of the hands, belonging to the defendants, had left them and gone to Richmond.

The alderman committed the plaintiff to the jail of Philadelphia, having required bail to the amount of 15,000 dollars, which the plaintiff could not give. On the 27th, the plaintiff was carried before Judge Rush, on a *habeas corpus*, who reduced the bail to 1000 dollars; but this he could not get, and he was again committed. On the 29th, the defendants sued out the writ mentioned in the second count, for seducing the defendants' workmen and servants, and demanded bail in 6000 dollars, which, on citation before Judge Rush, was reduced to 600 dollars.

The defendants, having obtained from the governor of Delaware, a requisition to the governor of Pennsylvania, for the removal of the plaintiff to the former state, as a fugitive from justice, he was, upon the warrant of the governor of Pennsylvania, removed, on the 6th of January, to the jail at New-Castle. The defendants discontinued their civil suit in Pennsylvania, and renewed it in Delaware, laying their damages at 2000 dollars. On the 4th of February, the plaintiff, upon a *habeas corpus*, obtained from the Chief Justice of Delaware, was discharged from confinement under the criminal charge, upon the ground, that he ought to have been committed under a warrant from some magistrate of that state, and not under the warrant of the governor of Pennsylvania, which only authorized his removal. But he was remanded, to answer to the civil action. Thinking now to correct this error, the defendants obtained a second warrant against the plaintiff, from a justice of the peace of Delaware; charging him with a suspicion of having stolen a brass steamer, and sundry other articles, of the value of forty dollars.

## Munns vs. Dupont et al.

or having caused the same to be stolen. It is admitted that the stamper is the same instrument with the pounder, mentioned in the warrant issued by Mr. Keppel. On the 11th of March, the plaintiff was again discharged upon a *habeas corpus*, on the ground, that by the law of Delaware no person can be committed by a judge or justice, who has once been discharged upon a *habeas corpus* from confinement, on account of the same offence. In May, a bill was sent to the grand jury, charging the plaintiff as the receiver of five pieces of parchment sieves, the property of the defendants, knowing them to be stolen. The jury found the bill, and the trial being postponed, upon the motion of the plaintiff, until December, (during all which time he remained in confinement,) upon a trial before the petit jury, the defendant was found not guilty. The Attorney General, then moved the Court to certify probable cause, in order to compel the plaintiff, Munns, to pay the costs of that prosecution, under the Constitution of the state. But the counsel for Munns agreed that his client should pay the costs, if the Court would not grant the certificate; in consequence of which, the certificate was not granted.

The balance of the evidence, except such parts of it as will be, more particularly noticed hereafter, relates to the plaintiff's sufferings, which, it must be acknowledged, were very great. But as to these, it is to be observed, that except where they were produced by the immediate agency or interposition of the defendants, no inference of malice can be drawn from them, to charge the defendants, although they may be considered in estimating the damages, if the plaintiff has made out such a case as to entitle him to a verdict for any thing. For the assault and battery at the Buck, the defendants have been indicted and punished, by a fine of fifteen dollars each, so that that transaction is no otherwise to have influence on your minds, than as it may become an item in the account of malice charged upon the defendants. So, too, the high value affixed to the articles charged to have been stolen, in the Philadelphia warrant, and

the low value fixed to the same articles, in the Delaware warrant, and the amount of damages claimed in the civil suit, brought in Pennsylvania, are only to be considered in relation to the question of malice.

The question, then, is, are the defendants liable for damages, on account of the warrant issued by Mr. Keppole, and the consequent confinement of the plaintiff under it? and 2d, are they liable in consequence of the indictment in Delaware, and the injuries to which it exposed the plaintiff?

The question upon which this cause must be decided, is not whether the plaintiff has suffered from a charge of which the defendants were the authors, and which was not founded in truth, but whether the charge was made maliciously, and without probable cause. In trials of actions of this nature, it is of infinite consequence to mark with precision, the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the one hand, public justice and public security require, that offenders against the laws should be brought to trial, and to punishment, if their guilt be established. Courts and juries, and the law officers, whose duty it is to conduct the prosecutions of public offenders, must in most instances, if not in all, proceed upon the information of individuals; and if these actions are too much encouraged,—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavour to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed, by evidence which the accused duly can furnish. Even if he be possessed of the whole evidence, he may err in judgment; and in many instances, a jury may acquit, where to his mind the proof of guilt were complete. It is not always the fate of those to command success, who deserve it.

On the other hand, the rights of individuals are not to be



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Munn v. Dupont et al.

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lightly sported with; and he who invades them, ought to take care that he acts from pure motives, and with reasonable caution. For the integrity of his own conduct, he must be responsible; and his sincerity must be judged of by others, from the circumstances under which he acted. If, without probable cause, he has inculpated another, and subjected him to injury, in his person, character, or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But though malice should be proved, yet, if the accusation appear to have been founded upon probable ground of suspicion, he is exonerated by the law. Both must be established against him; viz. malice, and the want of probable cause. Of the former, the jury are exclusively the judges—the latter, is a mixed question of fact and law. What circumstances are sufficient to prove a probable cause, must be judged of, and decided by the Court. But to the jury it must be referred, whether the circumstances which amount to probable cause, are proved by credible testimony or not.

What, then, is the meaning of the term “probable cause?” We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. What, then, were the grounds of suspicion, upon which the defendants acted in relation to the warrant of Alderman Keppel, under which the plaintiff was apprehended and committed? The plaintiff was a stranger, and his character totally unknown to the defendants. He took up his abode at an obscure tavern, in the neighbourhood of the defendants’ manufactory, where he contrived to procure frequent interviews with the workmen employed there, for the purpose of seducing them from their engagements with the defendants, and of obtaining from them a knowledge of the machinery and process, used in the manufacture of gunpowder, which the defendants had carefully endeavoured to keep secret. He offers one of them in particular, Bowman, a reward for

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Munn v. Duport et al.

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bringing to him a brass pounder, or a pattern of it. The pounder was brought, was afterwards concealed, and about the same time, Bowman secretly absconded. The plaintiff came to Philadelphia, and although he soon afterwards knew that the defendants were also in this city, and suspected that they were following his footsteps, as he expresses it in a letter to his employers, yet, when arrested by the constable, he denied his name, and put to that officer suggestion, by no means calculated to allay the suspicions which existed against him. The letters taken from him by the elderman, developed fully the objects which had carried him to the neighbourhood of the defendants, and contain allusions to the article of machinery which the defendants had missed.

Called upon to declare an opinion, whether these circumstances, if proved to your satisfaction, afforded a probable cause for the prosecution in relation to the brass pounder, the Court feels no hesitation in saying, that they did; and still further, that the plaintiff has no person but himself to blame for that prosecution, and the sufferings it has produced. A man may undesignedly and innocently become the object of suspicion, and of unmerited, though justifiable prosecution. In such a case, he may with great propriety call upon his accuser to acquit himself, by strong evidence, from the charge of rashness and malevolence, before he can claim to be excused from the consequences of his conduct. But, if he has intentionally acted in such a manner as to connect himself with the supposed guilt, and has, in fact, participated in it, shall he be permitted afterwards to complain that he had become an object of suspicion, and to claim the assistance of the law, to compensation for the losses to which he had thus exposed himself? In this case, the *brass pounder* was taken and carried away, at the instigation of the plaintiff; was in his possession, as he afterwards acknowledged; and was then concealed by the person who took it, and who afterwards ran off—and does it now lie in the plaintiff's mouth to say, that the defendants had not probable

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Murray vs. Dupont et al.

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cause for suspecting him as the felon? But, it is said, that still there is no proof, that a larceny was committed by any person; and the proof of this, is essential to the defence. Without determining conclusively upon the soundness of the doctrine contended for, we must be permitted to express the hesitation of the Court, in approving it. It would seem to demolish the whole ground of defence, allowed to the defendant in this action; if, notwithstanding the strongest circumstances of guilt, the motives of the action should, upon a full examination of the evidence to be furnished by the person suspected, turn out differently from what they appeared;—if probable cause shall excuse, in relation to the person suspected, and yet afford no protection, as to the offence, supposed to have been committed. But, it is by no means to be admitted that a larceny was not committed, in relation to the brass pounder. Baron Eyre defines larceny to be “the wrongful taking of goods, with intent to spoil the owner *ex causa lucri*,” and what are the facts of this case? Bowman secretly took, and carried away this instrument, for a reward promised him by the plaintiff, as is proved in the cause; and he concealed, or otherwise disposed of it, so that it was lost to the owner. Whether his intention was to spoil the owner, or to convert the article to his own use, would be a proper subject of inquiry with a jury, upon all the circumstances of the case.

But, it is proved by two witnesses, that the plaintiff afterwards acknowledged that Bowman had stolen the pounder; and whether, in technical language, he had done so or not, the plaintiff cannot, in this action, make it an objection, that in point of strict law, a larceny was not committed.

As to the three draughts of machinery, charged to have been stolen by the plaintiff, it must be admitted, that the defendants proceeded not only without probable cause, but without any cause at all. It does not appear, by the evidence, that the defendants ever possessed such draughts, and consequently, they could not have been deprived of them. This charge, (which

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*Munn v. Dupont et al.*


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is certainly unfounded,) being connected in the same warrant with another which was founded, may or may not have produced injury to the plaintiff; and if in your opinion it did so, and was maliciously made a ground of prosecution, the plaintiff is entitled to a verdict on that account, for such damages as you may think right.

We shall notice the warrant taken out by the defendants in Delaware, merely for the purpose of observing, that it is not made a distinct ground of charge against the defendants, and is only relied upon as a circumstance to prove malice. Of course, no damages could be given on account of that prosecution, even if it had been made without probable cause; and if the defendants had probable cause for obtaining the first warrant, the grounds of suspicion had received additional strength, before the second was granted; the plaintiff having previously acknowledged that the poulder, or stamper, (which means the same thing,) had been stolen by Bowman, brought to him, and afterwards concealed.

2. The second ground of complaint is, the indictment against the plaintiff in Delaware, for having received five pieces of parchment, four of them perforated with holes, knowing them to have been stolen. How stands the evidence, in relation to these articles? It is in full proof, if the witnesses are believed, that Peebles, one of the workmen in the defendants' manufactory, by the plaintiff's procurement, cut from the parchment sieves belonging to the defendants, without their knowledge or consent, a number of pieces of different sizes, which the plaintiff afterwards had in his possession; and which were produced at his trial. And if this evidence required any support, the finding of the bill of indictment, and the agreement of the plaintiff's counsel to pay the costs of that prosecution, which the law excused him from doing, unless a certificate of probable cause was granted, are strong indeed upon the point of probable cause.

Upon the whole, if the jury think that the facts above stated

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Manns vs. Dupont et al.

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and proved, the plaintiff is not entitled to a verdict, as to the two charges which respect the pounder and sieves; because, though he should have proved malice to your satisfaction, the defendants have justified themselves, by proving probable cause for those prosecutions. And as to the three draughts of machinery, you are to decide, whether that charge was maliciously made, and was productive of injury to the plaintiff.

*The plaintiff suffered a nonsuit.*

*Nota.* One of the counts in the declaration, is for maliciously bringing a civil action against the plaintiff in Pennsylvania, and holding him to bail in 6000 dollars; to support which, the plaintiff offered the second, in which the writ appeared to be returnable to 1st March 1809, whereas, the declaration stated it to be returnable the first Monday in December 1809.

*By the Court.* The evidence does not support the declaration; and, therefore, the record cannot be read, in order to support a claim for damages under this count. But it may be used as evidence of malice, in support of the other counts.

2. The Court refused to suffer a letter written by Feebles to Brown, Page, & Co., to be read, to prove that the writer had offered his services to Brown, Page, & Co., and thus to repel the charge, that he was seduced by the plaintiff; because, it is not the best evidence, since Feebles might have been examined under a commission.

3. A commission to Delaware, was directed to two commissioners, nominated by the plaintiff, and to two or three nominated by the defendants. They met to execute the commission, and after having proceeded some length in the examination, the defendants' commissioners withdrew, and refused to go on with the execution of it. The other two executed and returned the commission.

*By the Court.* The commission being joint, it could not be executed by two only of the commissioners, although the others refused to act.

4. The papers taken from the person of the plaintiff by the alderman, without the request or interference of the defendants, and which were used on the trial of the indictment in Delaware, were offered in evidence by the defendants, and objected to.

*By the Court.* We give no opinion as to the propriety of the conduct of the alderman, in taking these letters from the person of the plaintiff. But, having been taken, and being in the defendants' possession, there is no reason why they should not use them.

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Munn v. Dupont et al.

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5. The subscribing witness to an agreement between the plaintiff and Bowman, stated that he was called into the room to sign the paper as a witness, but did not see them execute the same, or acknowledge that they had done so; but they both told him it was their agreement. This was objected to, but admitted by the Court.

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Stille vs. Traverser.

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## STILLE vs. TRAVERSE.

The defendant, as master of the Hope, took on-board a quantity of coffee at Lagaira, the property of L., and signed a bill of lading, to deliver the same to C. in Philadelphia, to which port the Hope was about to proceed. Afterwards, L. having borrowed a sum of money of J., the captain signed a second bill of lading, by which he stipulated to deliver forty-five bags of the same coffee to the plaintiff, as a security for the repayment of the money borrowed.

Held, that the defendant, although he had delivered the whole of the coffee to C. under the first bill of lading, was liable to the plaintiff, for the forty-five bags of coffee mentioned in the second.

THE defendant, the master of the Hope, lying at Lagaira, took in a parcel of coffee the property of Mr. Lancaster, and gave a bill of lading, to deliver the same to Mr. Kerns of Philadelphia, to which port the vessel was destined. Lancaster, having borrowed 600 dollars of one Jacobs, then at Lagaira, gave him a bill of exchange at eight, upon said Kerns; and for securing the same, he obtained a bill of lading from the defendant, for the delivery of forty-five bags of the above coffee to the plaintiff, the agent of Lancaster; which bill is dated the day after the general bill for the whole cargo. By an endorsement on the bill of lading for the forty-five bags of coffee, it was agreed, that if the same should sell for more than the amount of the said bill, in case that should not be paid, the surplus was to be paid over to Lancaster.

Upon the arrival of the Hope at Philadelphia, the whole cargo was delivered to Kerns, who refused to accept or pay Lancaster's bill. Previous to such delivery, the forty-five bags were demanded by the plaintiff, but were taken away by Kerns, who had a permit for the landing of the whole cargo, as the plaintiff had for landing the forty-five bags.

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Stille vs. Traversce.

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Mr. Ingersoll, for the defendant, stated that his client was merely a stake-holder, and that he only wished the case to be rightly decided, that his client might not lose his recourse, in case of a verdict against him; for which purpose, he had notified Kerns to appear, and defend the suit.

Peters appeared for Kerns, and exhibited the bill of lading for the whole cargo of coffee, and stated that the same were the proceeds of an outward cargo, sent out under the management of Lancaster, his supercargo; but he stated, at the same time, that he did not, on the part of Kerns, mean to defend the suit, but should leave the defendant to justify himself, for having given the bill of lading for the forty-five bags.

*WASHINGTON, Justice*, charged the jury. Whether Lancaster or Kerns was the real owner of this coffee, does not appear; and in this case, is immaterial. It may become necessary for the defendant to ascertain that point, in case he should have to recover over against either of these parties, what may be recovered against him in this action. But there is no question, as to the defendant's liability to comply with his bill of lading to the plaintiff. If, as a stake-holder, he thought proper to deliver the property to either of the contending parties, he no doubt took care to be indemnified; and whether or not, he is bound by his contract with the plaintiff. Your verdict, therefore, must be for the plaintiff.

*Verdict for plaintiff.*



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 Kelly vs. Johnson et al.
 

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cargo, which he refused. The defendants threatened to sell the cargo, for the benefit of those it might concern; upon which Warder consented to receive the cargo, and advertised it for sale. The defendants refused to deliver the cargo to the purchaser, until they were paid their account, about 1000 dollars, for storage, wharfage, and other expenses and losses to which they had been exposed, by having had the cargo so long on board; and finally, it was agreed that the defendants should receive the said sum, but without prejudice to the plaintiff's right to claim the same, to be decided in an amicable action.

The referees allowed the defendants' account to the amount of about 1000 dollars; and one of them, upon his examination, stated, that the vessel, but for having this cargo on board, might have been employed in the coasting trade—that the vessel was injured by keeping it on board, and that they considered the sum allowed, only as a fair compensation for their losses.

Dallas for the defendants.

Hallowell cited the following cases, to show that no freight is due, till the vessel breaks ground. Abbot 179. 207; and that an embargo does not dissolve, but only suspends, the contract to carry a cargo; 3 T. Rep. 362, also, Odlin vs. The Insurance Company of Pennsylvania, in this Court, and 3 Johns. 334.

*WASHINGTON, Justice.* If regular bills of lading had been signed, and no law had afterwards passed to affect the contract of affreightment, it is admitted, that the defendants were bound to carry the goods, as soon as the embargo was removed.

But, it is said, that the refusal of the captain to sign bills of lading, and the nature of his receipt, made every thing executory, and varies this from most other cases. We think quite otherwise. The meaning of the receipt is plainly this, that as the embargo operated, for the present, to interrupt the voyage, and to suspend the effect of a bill of lading, if it were given, it would be unnecessary at that time to sign them; but, that as

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 Bryant vs. Hunters et al.
 

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should first expire, convey to the said trustees, or the survivor of them, some good estate, real or personal, sufficient to secure the payment of 300 dollars annually, on the 10th of November, for the sole and separate use of said Margaret Bryant, during the marriage; and also, sufficient to secure the payment of 5000 Mexican dollars, for her sole use in case she should survive him, to be paid to the trustees within six months after his death; and in case of her death before him, then to be paid to the trustees, for the use of the child or children of the marriage; or if the said A. Hare should die before his said wife, and by his last will, should, within the said year from the date of the bond, give to her such estates, legacies, bequests, and provisions, as should be fully adequate to the provisions hereby intended to be made for her and her children; then, and in either of the said cases, the obligation to be void.

That the marriage took effect. A. Hare died in 1799, leaving a will; whereby he devised to his said wife, his silver plate and household furniture. To John Hare, his only child, and his heirs, a tract of land in the Natchez district, containing 1000 acres. To his wife and son, and to such other children as he might have by his said wife, a tract of 10,000 acres in Kentucky, one-half to his wife, in fee, and the other to his son, and to such other children as he might have, in fee, to be equally divided, &c.; and if no other children, then the whole of said moiety to his said son; and in case of his and their death, before twenty-one, then, the whole 10,000 acres to his wife, in fee. The residue of his estate, real and personal, he gives in the same manner, in moieties, to his wife and child, or children, by her, in every respect like the devise of the 10,000 acres; and if he has no child to live to twenty-one, then, the whole of said residue to his wife, in fee; and appoints his wife, Thomas Todd, the plaintiff, and George Hunter, his executors.

That the widow and the plaintiff, renounced the executorship, and Todd qualified. In February 1801, Margaret Hare, the widow, made a nuncupative will, by which she directed

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 Bryant vs. Hunters et al.
 

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that all the property, of every kind vested in her by the will of her husband, or otherwise, should be divided between her nephew, Thomas Y. Bryant, (the plaintiff,) and her son John, allowing John the largest portion—her plate, to John. In case either Thomas or John should die, the estate now vested to devolve to the surviving heir. This will was duly proved and recorded in the state of Kentucky, where it was made.

That after the death of Margaret Hare, letters of administration, *cum testamento*, &c., on her estate, were granted to the complainant.

That in February 1804, an action of covenant was brought in a Court of Kentucky, by George and William Hunter, on the above bond of A. Hare, against Todd, his executor; who pleaded the provision made by A. Hare, by his will, as full satisfaction of the provisions to be made by the bond; and that Margaret Hare never refused to abide by the said will. To this plea there was a demurrer, which was sustained; and on a writ of inquiry, the jury found 2647l. 10s. damages, but by agreement, the same was not to bind Todd, farther than he had assets.

That on the 25th of September 1801, the plaintiff, as well in his own right, as administrator of Margaret Hare, filed a bill in the Court of Chancery of Kentucky, against Todd and the Hunters, praying that the former might be enjoined from paying the money so recovered, to the latter, and that the same might be decreed to be paid to him.

That Todd, by his answer to that bill, charged that Margaret Hare had received several sums from her husband's estate, and that the plaintiff was chargeable with certain sums received by him from the estate of A. Hare, which he had not accounted for. That the personal estate of A. Hare, sold for 638l. 14s. 8d., as per account annexed, and that he had paid off sundry debts. The answer of George Hunter to that bill, stated, that Margaret Hare was not of a disposing mind, when she made her will; also, that the complainant had received large

## Bryant vs. Hunters et al.

sums of the estate of A. Hare, not accounted for; also, that he had received large sums of the estate of Margaret Hare. To these answers, the plaintiff filed a special replication, stating how much Margaret Hare received of her husband's estate—that he paid to A. Hare, what moneys he had received on certain cargoes committed to his care. The account of sums received by Mrs. Hare, after deducting debts paid by her, leave a balance against her of £127, and a balance in his own favour as to the cargoes. The Court, in that suit, directed Todd to pay over the assets to the plaintiff, in part satisfaction of Hunter's judgment, and reserved to the plaintiff leave to prosecute any other suit, for obtaining the value of said judgment.

That on an appeal, the superior Court decided that no provision for the issue of the marriage was made by the marriage contract, but in the event of A. Hare surviving his wife; and, as this did not happen, the son could have no claim under that contract, nor, of course, the trustees; that the question was to be considered as between the plaintiff and Todd; that the provision for the wife, did not destroy her paramount right under the contract, but was to be considered as a satisfaction *pro tanto*; that of course, the inferior Court did right in making the marriage articles the basis of the decree; that the interest of Margaret Hare, under those articles was bequeathable under the general expression "property," and if not specifically bequeathed, would devolve on her representative; that the plaintiff was entitled to the whole judgment, to be settled between him and John Hare, who was not a party to the suit; that Todd having made no claim of offset, on account of the estate devised to Margaret Hare, or shown its value, the Court could only decree, as it did, for the balance of assets in his hands.

That in virtue of the above decree, the plaintiff received from Todd 60*l.* 2*s.* 3*d.*, the whole amount of assets in his hands—admits that Margaret Hare received of her husband's estate, 147*l.* 4*s.* 10*d.*, which will also be a credit to the judgment, if deemed proper by the Court. That John Hare did

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Bryant vs. Hunters et al.

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in 1806, in his minority, intestate, and without issue. That Todd delivered to George Hunter, after Margaret Hare's death, sundry patents and conveyances of land, chiefly in Kentucky; and that said Hunter has received sundry evidences of debt, belonging to the estate of A. Hare.\* That according to the laws of Kentucky, and of the Mississippi Territory, where the major part of A. Hare's lands lies, the same descended to Thomas Bryant, and others named in the bill. Prayer, that Hunter may account for all sums and evidences of debt of A. Hare, received by him, and that the other defendants, the heirs of Mr. and Mrs. Hare, may join in conveying the aforesaid lands to trustees, to apply the same to the satisfaction of the judgment on the marriage article bond, and for other relief.

The answers do not materially vary the case stated in the bill. The defendant, George Hunter, claims a debt due to him from A. Hare, by simple contract.

Todd, for the plaintiff, insisted, that the devise by A. Hare to Margaret Hare, is not even a satisfaction *pro tanto*; being given under conditions; as the debts were first to be paid. 1 P. W. 401. 1 Brow. 120. 2 Vez. Jun. 466. 3 Idem 664. That the devise of this debt by Mrs. Hare, passed it to the plaintiff, and the judgment in Kentucky, as to Hunter, is conclusive. That Margaret Hare did not accept the devise of her husband, and, therefore, the plaintiff may come here to have this debt satisfied out of land.

Tilghman, for the defendants. The plaintiff is entitled only to a discovery of the real estate of John Hare, but not to relief in equity. The marriage contract is to be postponed to creditors. It is agreed, that Mrs. Hare brought no fortune to her husband, and, therefore, she is not, in equity, entitled to interest, only for one year before her husband's death; whereas, the judgment is for interest during the coverture. 1 Eq. Cas. Abr. 66. A. Hare, was bound either to settle the land in his lifetime, or to devise an equivalent by will, within a year; whereas, this will was not made within a year. The provision is for her child-



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Bryant *vs.* Hunters *et al.*

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son, as well as herself, and they would have been entitled to a provision out of the 5000 dollars. A marriage contract, is considered as voluntary in relation to creditors at the time, though it may be otherwise, as to subsequent creditors. 9 East.

The devise to Mrs. Hare, is a satisfaction. The Court leans against double provisions. 3 Atk. 419. 1 Vez. 1. 2 Vez. Jun. 356. 3 Idem 430. Mrs. Hare cannot take under the will, the whole of her husband's land, except the 1000 acres, and against the will, so as to sweep away that land. The Court will marshal the assets, so as to let in the simple contract creditors.\*

*WASHINGTON, Justice.* The first question is, whether the devise to Mrs. Hare, was a satisfaction or performance in whole, or in part, of the marriage contract, and was accepted? The general rule is, that a devise of *land*, is not a satisfaction, or part performance, of an agreement to pay *money*. But, in this case, A. Hare, by the marriage contract, bound himself to assure to the trustees of his intended wife, a sufficient real or personal estate, to secure the payment of 5000 dollars for her sole use, in case she should survive him, or should, by his last will, within the said year from the date of the bond, bequeath to her such estate as should be fully adequate to the intended provision. He accordingly makes a provision for her by will, and, though not made within the year, this circumstance is immaterial; a will being ambulatory. This provision is to all intents and purposes, a performance or part performance of the contract; and, although he does not so declare in his will, yet, that he intended it, is not to be questioned; for, it is inconceivable, that he should have meant to give, as a bounty to his wife, nearly half

\* *NOTE.* As to satisfaction, and the principle that a man cannot take under, and against a will, see 2 Eq. Cas. Abr. 35, 36. 8 Vin. 472. 2 Vern. 581. Cases Temp. Talb. 178. 182, 183. 2 Fonb. 380. Prec. Ch. 394. 2 P. W. 616. 2 Vern. 478. Salk. 508. 2 Atk. 300. 2 P. W. 355. 1 Vez. 519. 2 Atk. 491. 2 P. W. 616. 3 Idem 245. 2 Vern. 177, 298. 3 P. W. 333. 617. 3 Idem 327. 1 Idem 408. 410. 3 Atk. 326.

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Bryant vs. Hunters et al.

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his estate, and to have left this large debt to sweep away the provision intended for his son. The reference in the bond to a provision in land, or other property, to be made by will, differs this from all the cases that were cited; and, we must presume, that the will was intended to comply with the condition of the bond. The nuncupative will amounts to an express acceptance of the devise; as it disposes of all the property of every kind, vested in her by the will of her husband, or otherwise. This property, consisted of land and personal estate, the latter very trifling, particularly, after the plate and other things devised by her, were deducted. The Court has no authority for limiting her words to the personal property, because, the will could not, in point of law, pass the real estate; a circumstance which most probably she did not know.

Is this question concluded, by the decision of the question of law in the Kentucky Courts? We think not. It is true, the executor of A. Hare, by his plea, put this point directly in issue; but, at law, it could not be tried; for, if the provision made by the will, amounted not to full performance, we do not see how the verdict could have been otherwise than it was. But, in equity, and especially when the plaintiff is seeking relief against the real estate, this Court must decide on equitable principles.

Second question. Is the plaintiff entitled to claim, in this Court, the whole amount of principal, as well as the interest which accrued during the coverture? The judgment at law, is for the whole sum; but, if it be inequitable, a Court of Equity will not, in granting relief to the plaintiff, allow him more than he is justly entitled to. We admit, that if the judgment would be conclusive upon the Court of Equity in Kentucky, it is conclusive upon this Court. But, that is not the case, and the inconclusiveness of the judgment arises, not from the circumstance of the Court in another state being called upon to execute that judgment, but, from the peculiar principles and rules which regulate a Court of Equity, which differ from those

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Bryant vs. Hunters et al.

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which prevail in Courts of Law. We shall therefore direct an inquiry, as to this subject.

Third. What relief is the plaintiff entitled to, in respect to the personal estate of A. Hare? Certainly, to the application of it to discharge the whole sum due, in aid of the real estate devised to Margaret Hare, in part performance of the marriage contract. Consequently, the defendants, the executors of A. Hare, must account for the personal estate, which has come to their hands.

Fourth. What relief is the plaintiff entitled to, against the real estate of A. Hare, in case the personal estate should not be sufficient to pay what is justly due, under the marriage contract, after deducting the value of the real estate devised to Mrs. Hare?

As to the lands devised to *Mrs. Hare*, there is no ground for charging them in the hands of the heirs of Mrs. Hare, to make up such deficiency. It would be absurd to say, that they were liable in her own hands, and of course, they cannot be so in the hands of her heirs. We know of no principle, which will subject the real estate of the creditor, in the hands of her devisee or heir, to satisfy the representatives of the personal estate of the same creditor.

As to the 1000 acres of land devised to John Hare by his father, the plaintiff is clearly entitled to have any deficiency in the payment of his debt made up out of that estate, since, upon the opinion given on the first point, Mrs. Hare did not take the land devised to her as a bounty, but in part performance of the contract of A. Hare, under the marriage settlement.

And, since it is possible that the plaintiff's claim may exhaust the whole of the personal estate, so as to deprive the defendant, Hunter, of personal assets sufficient to pay the debt due to him, the assets must be so marshalled as to apply this real fund, or so much of it as may be necessary, fully to discharge the plaintiff's debt, and to leave so much of the personal

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 Bryant vs. Hunters et al.
 

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estate, as may be sufficient to pay the debt due to the defendant, Hunter.

*Decree.* This cause came on, &c.; whereupon the Court, being of opinion that the real and personal estate devised to Mrs. Hare, by the will of A. Hare, her husband, are to be considered as made in part performance of the marriage contract, dated, &c., amongst the exhibits in this cause, according to the value of the property so devised at the time of the death of the said A. Hare; and that the plaintiff is entitled to full satisfaction of the principal sum and interest justly due, by the said contract, in case the value of the estate devised to the said Margaret Hare, by her said husband, at the time of the death of the said A. Hare, together with such sums as have, since the death of the said A. Hare, been received by the said Margaret Hare, and by the plaintiff, as her administrator, were insufficient, fully to discharge the same, out of so much of the personal estate of the said A. Hare, in the hands of the defendants, as will remain after satisfying the just claims of the defendant, George Hunter, for moneys due to him by the said A. Hare; and in case the same should be insufficient, fully to satisfy the said principal sum, and interest, due to the complainant, then, out of the 1000 acres of land, devised by the said A. Hare to his son John; it is therefore decreed and ordered, that the commissioner of this Court, do state an account of the balance now due to the plaintiff, upon the above principles, and that he also state the value of the estate devised to the said Margaret Hare, by her husband, at the time of his decease, as also to allow, what to him may seem a reasonable provision for the said Margaret Hare, during her marriage, in lieu of the 300 dollars, agreed to be paid to her by the said A. Hare; and for ascertaining the value of the lands devised to the said Margaret Hare. Commissions are awarded to the parties for taking depositions to prove the same, and also, the advances made to the said Margaret Hare by her said husband; either party giving to the other ——— days notice of the time and place of executing

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**Bryant vs. Hunters et al.**

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the said commissions; and further, that the said commissioner do state an account of moneys due to the defendant, George Hunter, by the said A. Hare, stating specially, such further matters as either party may require, or the said commissioner may deem material. The Court reserves the question of interest to the final hearing.

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**Blagg vs. The Phoenix Insurance Company.**

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**BLAGG vs. THE PHOENIX INSURANCE COMPANY.**

The Court refused to grant a new trial, where the evidence submitted to the jury, and upon which their verdict was founded, was such as it was peculiarly their right to decide upon; and also, where the construction given by the jury to the evidence, appeared to be consistent with the justice of the case.

**RULE** to show cause why a new trial should not be granted.

*WASHINGTON, Justice*, delivered the opinion of the Court. As the objections made to the authenticity of the bill of lading and invoice, rested upon conflicting evidence, upon which the jury were alone competent to decide, and their finding is in favour of the plaintiff; we must take it for granted that those papers were signed by the captain, and are entitled to all the credit, usually given to such instruments. They are, when proved, the ordinary evidence of property, and of the interest of the insured. In opposition to this evidence, the testamentary declaration of Captain Ferguson, was permitted by the Court to go to the jury; which evidence, was inconsistent with the bill of lading and invoice. The Court could do no otherwise, than leave it to the jury, to say which of the declarations of the same person, in one or the other of these instruments, was to be believed. In opposition to the credit claimed for the latter, it was urged at the bar, (and not without reason, we think,) that the declarations which it professed to record, were made by a man *in extremis*, in a language foreign to those who took them down; or, if in the same language, then, by one who might so express himself as to be misunderstood; and that possibly, he might not think it safe to acknowledge, that so large a sum in specie was about to be carried away, from a country whose po-

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**Blagg v. The Phoenix Insurance Company.**

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licy it generally is to prohibit the exportation of it. These topics were submitted to the consideration of the jury, and have very probably had weight with them.

But that which has greater weight with the Court is, that the testamentary declaration itself, is so far consistent with the justice of the case, as to raise a strong presumption that property sufficient in value to cover the sum insured, was put on board. The captain appears to have had nearly 10,000 dollars in specie and cocoa, partly on board, and partly ready to put on board; for, he expresses no doubt of receiving the 6600 dollars worth of cocoa which he had purchased, or the 1400 dollars, due from Paulons. It is highly improbable, therefore, that he sailed from Chagres, without the cocoa and money, either in specie, or its value in other articles. Now, although evidence of this sort, might not of itself have been sufficient to entitle the plaintiff to a verdict, unless it appeared that property to the amount of the sum claimed was actually on board, yet, it affords a strong reason, in a case circumstanced like the present, why a new trial should not be granted.

*Rule discharged.*

**BERRY vs. SMITH.**

It is not upon the supposition of fraud, from the length of time to which indulgence has been granted by the plaintiff, in an execution to the defendant, that a subsequent execution, levied, has been preferred to a prior execution; proceedings under which, have been suspended by such indulgence.

The true reason for the preference given to the subsequent execution levied, is; the end of the execution is to obtain satisfaction of the debt, and when delivered to the officer, it is his duty to proceed immediately for the purpose of obtaining satisfaction. The delivery of the execution, changes the property, and vests it in the sheriff; and his possession is notice to all the world.

If the plaintiff, in an execution, orders the sheriff not to levy, the purpose of the delivery of the execution is defeated, and no change of property takes place.

It is not necessary that the officer remove the property, or that he sell it before a reasonable time; but, if by order of the plaintiff, the property is left with the defendant, the execution has no operation.

There is no difference between a suspension of an execution one day, or for one month or more; the order for any suspension, deprives the act of the officer of all its force, until countermanded; and a second execution, levied in the mean time, if pursued, will take preference of the first. *Aliter*, if the second execution issues after the continuance of the order to the officer not to proceed.

**C**ASE agreed. Judgment was entered in favour of the plaintiff, in the Supreme Court of Pennsylvania; and a *feri facias* issued on the 1st of January 1811; and was delivered to the sheriff on the same day about twelve o'clock, with direction not to levy it, till further instructions. On the same day, the plaintiff's counsel called at the house of the defendant, to inform him of the issuing of the execution, and to request his taking immediate measures to discharge it. The defendant was not at home.



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Berry vs. Smith.

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The next day, the plaintiff's counsel called again, between one and two, and found the defendant at dinner. He then called him to the door, and informed him of the issuing of the *feri facias*, said there was no desire to break him up, or to distress, if it could be avoided, consistently with the plaintiff's safety—that the execution was delivered to the sheriff, which would secure the property, and that the defendant must immediately see the plaintiff's agent, Mr. N., and make some arrangement with him, to prevent further proceedings under the execution. On the 3d of January, as the plaintiff's counsel did not hear from the defendant, or Mr. N., he directed the sheriff to proceed to make his levy; and accordingly, the sheriff went to the house of the defendant with the execution, and levied the same, but did not then remove the goods; and left them with the defendant, according to the directions of the plaintiff, till further orders, endorsed on the writ.

On the 4th of January 1811, two judgments were entered in the Circuit Court of the United States, at the suit of Harold and Prosser, against the defendant, and two *feri facias* were issued to the Marshal. About one o'clock, on the same day, the Marshal, by virtue of said executions, levied on, and seized the goods of the defendant, then being in his house; and no sheriff, or sheriff's officer being there, he removed the said goods without interruption or claims, (but that the defendant informed the Marshal, when he was about levying the said *feri facias*, that the sheriff had been there.) Neither the plaintiff, nor his counsel, nor agent, knew of the issuing of the said *feri facias*, or of the levy or removal of the goods, by virtue of them, until after it was done.

The above case was argued, upon a rule to show cause why the plaintiff should not have his executions satisfied, out of the moneys paid into Court by the Marshal; and the question for the opinion of the Court was, whether the plaintiff in the suit in the state Court, or those in the Circuit Court of the United

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*Berry vs. Smith.*


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States, are entitled to a preference of payment, out of the sales of the goods, so as aforesaid taken in execution.

Hopkinson, for the plaintiff, cited 4 Dall. 167. 208. 368. Brown's Rep. C. P. of this state, 26. 1 Dall. 187. Cowp. 177. 3 Burr 962. 1243.

Hallowell, for Harold and Prosser, cited *Barnes vs. Billington*, in this Court. *Welch vs. Murray*, 4 Dall. *Hurst vs. Hurst*, in this Court. 7 T. Rep. 20. Skin. 257. 2 Vent. 218. 1 Solon 526. 1 T. Rep. 729.

*WASHINGTON, Justice*, delivered the opinion of the Court. In most of the cases to be found in the books where the execution first delivered has been postponed, as against purchasers and posterior executions, in consequence of delay in the due execution of the writ, the time has been so long as to warrant a presumption of a design to protect the property; which, in contemplation of law, amounts to a fraud, however innocent and even praiseworthy, on the ground of benevolence, the motive might be which induced it. For this reason, therefore, we frequently meet with expressions, in the opinions delivered in those cases, which lead to the conclusion, that the mere circumstance of time furnishes the principle which is to determine the question of fraud. This is a case in which this supposed principle must be examined, and its soundness decided upon; for, the vigilance of the creditor under the second execution, has been so great, as to leave the first creditor only three days and a little more, for the exercise of his intended indulgence to the debtor.

In the cases reported in the books, the delay has varied from six days, to one and two years;—if this, it was shorter than the shortest of those periods, and if time be sufficient to govern the principle of decision, the Court would look in vain to the light which these cases have shed on the subject, to enable us to distinguish the substantial difference, between a delay of three, and a delay of six days; for, it must be remarked, that in the

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Berry vs. Smith.

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cases referred to, the delay was produced by the order or consent of the creditor; and in all of them the motive was honest, though the intended effect was protection to the property, for a longer or a shorter time. If the principle is to be collected from the mere circumstance of time, it is a phantom whose shape will vary according to the different visions of the judges who examine it, and in reality, will exist only to perplex, and to render the law uncertain. Rejecting, therefore, the expressions of judges, which, unless they are understood in reference to the cases before them, are loose, and altogether unsatisfactory; let us see what is the solid and material principle, which has governed their decisions. It seems to the Court, to be this;—that the end and object of an execution is, to obtain satisfaction of the debt for which it issued, and being delivered to the proper officer, it gives to the creditor a priority; because, the law points out to that officer his duty, which is to execute it without delay. In doing this, the property of the debtor is changed, and vests in the officer, for all the purposes of that execution. The change of possession, gives notice to all the world, of the real situation of the debtor, in relation to the property so seized, and prevents them from being deceived by the appearance of wealth, to which the debtor has no just pretensions. If the execution is delivered to the officer, with orders not to levy it at all, or until further orders, the purpose of the delivery is not answered, and all the legal consequences of the measure, in respect to creditors and purchasers, who would otherwise have been affected by it, are defeated. If the officer is ordered to levy on, but to leave the property with the owner, until he shall be otherwise directed, the party undoes, by such an order, all that the officer does by the seizure;—it works no change of the property;—it is no levy in respect to third persons. It is not necessary that the officer should remove the property, or even sell it immediately, if this be done in a reasonable time. But, he has effected nothing, if, by the plaintiff's order, he leave the prop-

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## CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1811.

**SENATE** { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
Hon. RICHARD PETERS, District Judge.

### THE UNITED STATES vs. ALEXIS GRASSIN.

Indictment, for an illegal augmentation of the force of a French privateer, by raising or otherwise altering the gun carriages.

The offence consists, in increasing, or augmenting, (or being concerned in so doing,) the force of any belligerent vessel, which was armed at the time of her arrival in the United States, by adding to the number of any of her guns prepared for use, or by the addition to her force, of any equipment solely applicable to war.

Raising or lowering the carriages, or cutting away the decayed wood in them, and replacing them with sound wood, by which they are rendered fit for use, is increasing the force of the vessel, by an equipment wholly applicable to war, and is expressly within the words and meaning of the Act of Congress.

THE defendant, the commander of a French cruiser, called the *Diligent*, belonging to a subject of France, a Mr. Guyon, domiciliated at New York, arrived at this port in April or May last. The defendant reported himself to have come in, in distress, and applied to the custom-house, and obtained a permit to land her cargo, guns, &c., and to repair. The cargo, and other articles mentioned in the application for a permit, were placed under the care of a custom-house officer; but the eight gun-car-

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The United States vs. Gorman.

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riages hereafter mentioned, were not enumerated in that paper, though the eight guns were. It appeared, in evidence, that this vessel was fitted out in France—that she was chased by a British ship of war, and in order to lighten herself, threw all her guns overboard, except one long six-pounder. She afterwards fell in with a British letter-of-marque, from which she took out eight 12-pound carronades, with their carriages; and after keeping them mounted on deck for three or four days, they were put into the hold, where they remained when she came to this port. Before the repairs of the vessel were completed, these gun-carriages were sent on shore, to a Mr. Seguin, the carpenter employed in repairing the vessel, who added about from 4½ to 7½ inches of new wood to them, so as to raise them, in order to fit the port holes, as was contended, and proved, by witnesses on the part of the prosecution, but contradicted by the defendant's witnesses; viz. Seguin and his workmen, who swore, that the carriages were not raised, but merely, that the decayed parts were cut away, and replaced by new wood. The carriages, being thus altered, were returned on board the Diligent, but being discovered by some of the custom-house officers, they were relanded, and the Diligent sailed without them. It was very fully in proof, that the guns upon the carriages, as they were originally, could not be fought through the port holes of the Diligent, and that it was necessary to raise them; although, one of the mariners swore, that they could be fought, and that they were fired to being vessels to, during the few days they were mounted. It appeared, that the defendant was sick and confined to his room, during the greatest part of the time that these repairs were making; and that the owner was here nearly the whole time, and acted in relation to the repairs.

WASHINGTON, Justice, charged the jury. The first question, whether an addition made to gun carriages, either by raising, or otherwise altering them, is an offence, within the fourth section of the Act of Congress of 5th June 1794.

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 The United States vs. Gassin.
 

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is admitted, that the addition of entire new gun-carriages is an augmentation within the law; but the alteration of old carriages is denied to be so. To the Court, it seems, that nothing can be more plain than the meaning of this section.

The offence consists, in increasing, or augmenting, or preparing, or being knowingly concerned, in increasing, or augmenting, the *force* of any belligerent vessel, which was armed at the time of her arrival within the United States by adding to the number or size of her guns, *prepared for use*; or by the addition thereto, (*that is to her force*) of any *equipment*, solely applicable to war. Suppose, then, that a vessel should arrive here, armed with twenty muskets, in complete order, and an equal number in her hold, but without locks, or otherwise useless—we ask, what would be her force, in guns prepared for use? The answer is obvious, twenty muskets; since the other twenty, not being prepared for use, can constitute no part of her force. But, if the other twenty are prepared for use, by adding locks, is not her force, then, forty guns prepared for use? The locks are an *equipment* solely applicable to war, and then the whole case is made out. For, the force of the vessel has been increased or augmented, by the addition to the guns prepared for use, by an equipment solely applicable to war. In like manner, if the vessel has but one cannon mounted and prepared for use, and other cannon, say eight, in her hold, dismounted, or on carriages so rotten, or too high, or too low to be used, her *force* is but one cannon. If, by raising or lowering the carriage, or replacing the decayed, by sound wood, they are rendered fit for use, her force then becomes increased or augmented to nine cannon, prepared for use, and this, by an equipment solely applicable to war.

The second question is, whether the gun carriages of this vessel were so altered, as to increase, or augment her force? One opinion has been given, that the guns could be effectively used on the gun-carriages as they were. You will judge, from the height of the port holes, and of the carriages, whether this was

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possible. That witness is contradicted on this point, by others examined in support of the indictment. Whether they were raised or not, is for you to determine; the witnesses being precisely at variance as to this point. But, it is proved by the defendant's witnesses, that the carriages were decayed, and were repaired by cutting away these parts, and substituting sound wood. It is, therefore, of no consequence, whether the sound wood which was put on, rained the guns or not; if, by the addition or substitution of it, for that which was decayed, these guns were prepared for use, so as to augment the force of the vessel, beyond what it was at her arrival. If nothing was done but what might well have been done without; it could not be said, that her force was augmented, by the addition of the equipment—quite otherwise, if the addition or alteration was necessary, in order to prepare the eight carronades for use. On this point, therefore, you must decide according to the evidence.

The third point is peculiarly a subject for your consideration, being a question of fact merely. It is, whether the defendant procured, or was knowingly concerned, in the addition or alteration that was made in the gun carriages? *affirmative*, every presumption is against the commander of a vessel, in such a case. It is scarce credible, that such important operations in respect to the armament of a vessel, should be undertaken by any person, without the orders of the commander. In addition to this, the omitting to mention these carriages, in the application to the custom-house for a permit to land, is calculated to excite suspicion, that some alterations were intended; because, if they had been mentioned, they would have been placed under the care of a custom-house officer, whose duty it would have been, to prevent such alterations from being made. That the defendant knew of these alterations, is strongly contended for upon the evidence of the marshal; who swears, that after the arrest of the defendant, he asked to him that his intention was only to remove the decayed timber, and to substitute new. But, whether he spoke of his own intention, or of those who



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during his sickness had acted in the business, is by no means clear. In this case, the general presumption above mentioned is a good deal weakened, from the circumstance, that the owner was in Philadelphia during the whole time that these repairs were going on, and that during the greatest portion of that time, the defendant was sick and confined to his room. His knowledge of what was going on, were this fully proved, would not be sufficient to fix him with the offence, unless he was in some way *coerced* in it. Upon this point, it is proper you should be satisfied. We have only to add, that if from the publications which were spoken of at the bar, you have received impressions unfavourable to the defendant, on account of acts done by him, unconnected with the offence for which he is now tried, we feel the fullest confidence that you will not suffer them to influence your feelings or your judgment; for, even if the charges made against him were proved, which in this case they were not, and could not be, they have nothing to do with the issue you are sworn to try.

The jury could not agree in this case, and frequently applied to the Court to discharge them. The Court informed the jury that they had not the power legally to discharge them, without the assent of the District Attorney, and the defendant's counsel. At length, after keeping the jury together for some time, this assent was granted by both sides, the Court agreeing to try the cause again this term, and the jury were accordingly discharged.

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The United States vs. The Administrators of Hillegas.

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## THE UNITED STATES vs. THE ADMINISTRATORS OF MICHAEL HILLEGAS.

Debt on a bond, dated 19th of July 1797, given by Michael Hillegas and others, to the United States, conditioned that Nichols, who had been appointed, in 1799, a collector of the internal revenue in the district of Pennsylvania, shall faithfully execute the office of collector of the internal revenue, and will account for, and pay over, what moneys he shall collect. A balance became due by Nichols to the United States, and, without the knowledge of the sureties in his official bond, he gave to the United States, bonds and mortgages, to secure the payment of the same, which were approved by the proper officers of the Treasury, and by which the amount due to the United States, was agreed to be paid in six, twelve, and fifteen months; one of which bonds was paid, and others were put in suit, by the District Agency of the United States.

The United States, in their political capacity, are a collective invisible body, and can only act by their officers, who constitutionally and legally administer the government, and by the agents duly appointed by them.

The Secretary of the Treasury, is the head of the Treasury Department, having the general direction, superintendence, and management, of the revenues of the United States, and the collection thereof.

The rule of law is, that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both at law and in equity; and this rule is applicable, as well to bonds with collateral conditions, as to bonds for the payment of money; and whether the arrangement is intended for the benefit of the surety or not.

THIS was an action of debt, on a bond executed by Nichols, Eddy, and Hillegas, to the United States, dated 19th July 1797, in the penalty of \$5,000 dollars; with condition, reciting that Nichols had been appointed by the supervisor of the Pennsylvania District, in 1794, a collector of the internal revenue, and the obligation to be void, if Nichols has faithfully executed, and shall

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falsely execute the said office, and account for, and pay over, what moneys he shall collect, &c. Upon oyer, the defendant pleaded performance generally, to which the replication assigns as a breach, that he had collected, and had not paid over to the supervisor, \$7,345 dollars. Rejoinder, that he had paid, and issue: Second rejoinder; that Nichols being, on the 9th of June 1794, indebted to the United States, in the sum mentioned in the replication, for moneys collected, did, on that day, execute and deliver to the supervisor, at his request, but for the use of the United States, three bonds, payable in equal sums, at six, twelve, and fifteen months, to the amount of the said debt, with warrants of attorney to enforce judgments, and also a mortgage for securing the same; and that credit was extended to the said Nichols, for said balance, for the aforesaid terms of six, twelve, and fifteen months; which bonds and mortgage were given, and credit extended to said Nichols, without the knowledge or consent of the said Eddy or Hilliges, his sureties, by means whereof, the said sureties were discharged. Supp-joinder acknowledges that the said bonds and mortgage were accepted by the United States, but that the supervisor, in taking the same, acted without the directions or knowledge of the United States; that the same were not paid and delivered by Nichols, at the instance and request of the United States; and that the United States did not enlarge the time of payment; but, that the supervisor, in doing so, had acted without the knowledge or consent of the United States. To this an issue was taken.

The facts were as follows:—Nichols was, in September 1794, appointed, by the supervisor, a collector; and in September 1795, he was appointed, by the President, an inspector. At the time Nichols gave the bond on which this suit was brought, he was indebted to the United States upwards of 20,000 dollars, as collector, and upwards of 6000 dollars as inspector. In May 1796, the supervisor removed Nichols from his office, as collector; and on the 28th of June 1798, the President re-

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moved him from his office of inspector. The above bonds, with warrants of attorney and mortgage, were given to W. Miller, who is styled supervisor; who delivered over the mortgage to the District Attorney, to bring suit on. A *titre facias* was accordingly issued upon the mortgage, in the name of Miller, for the use of the United States, some time in 1802. Judgment was obtained, the money raised, and brought into Court, and was claimed by the state of Pennsylvania, by virtue of some other or prior lien, except about 2500 dollars, which was taken out by the District Attorney for the United States, by permission of the Court. The United States, and the state of Pennsylvania, are still contending before the Supreme Court of the United States, for the residue of the money. One of the bonds, for upwards of 9000 dollars, was paid by Nichols to the supervisor, about the time it became due.

A letter was read, on behalf of the defendants, from the Secretary of the Treasury, dated 29th of June 1798, to Mr. Nichols, enclosing him the copy of a letter from the supervisor to the Secretary, and desiring to know, if the information contained in this letter is true. The letter enclosed was dated the 18th of June, and contained a report of the deficiency of Nichols in his two offices of inspector and collector. This letter from the supervisor, then stated, that for the purpose of securing the United States, in relation to so large a debt, he had, with the approbation of the commissioners of the revenue, obtained from him, bonds, and warrants of attorney, and a mortgage for the amount, to get which, he had judged it best to enlarge the time of payment.

The counsel appearing disposed to argue the points of law arising in the cause, as if there had been a demurrer; *Washington J.* inquired, whether there was any agreement or understanding amongst the counsel, to warrant this? That on the issue joined, the only question was, whether these securities were taken, and the time of payment enlarged, with the knowledge

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and consent of the United States? If the jury should be in the affirmative, on this question, the cause was with the defendants.

The counsel both agreed, that the intention and agreement was, to consider not only the facts put in issue, but the legal inferences from them, as involved in the trial, in the same manner as if the pleadings had so presented them. The Court then recommended a special verdict, or that the jury should reserve the points of law, which met the approbation of the bar.

*WASHINGTON, Justice*, charged the jury. The only question for your determination is, whether the securities mentioned in the pleadings were taken, and the credit to Nichols enlarged, by the United States, without the knowledge or consent of the sureties? The United States, are a collective invisible body; which can act, and can be seen only in the acts of those who administer the affairs of the government, and their agents, duly appointed and empowered to act for them. This position; which is undeniable, leads us naturally to an inquiry into the character and powers of those officers, concerned in the management of the revenues of the United States; and who appear to have had any agency in this particular business. And first, the *Secretary of the Treasury*, who is declared by law to be the head of that department. His duties are; to digest plans for improving and managing the revenue, and for the support of public credit; to prepare and report estimates of the revenue, and expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts, and making returns, and to grant warrants for money to be issued from the Treasury; to act in relation to the sales of the public lands; to make reports to Congress, on such matters as may be referred to him by that body, or which shall appertain to his office; and, generally, to perform all services, relative to the finances, required of him by law. He is to superintend the collection of the duties on impost and tonnage, as he shall judge

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best; and the different officers employed in relation to the internal revenue, are, from time to time, for the better execution of their duties and trusts, to observe and execute such directions as they shall receive from the Treasury Department. See Acts of Cong. 2d Sep. 1789, 3d March 1791, 6th May 1792.

The *Commissioner of the revenue*, is a member of the Treasury department, particularly charged with the *superintendence*, under the direction of the head of that department, of the collection of the revenues of the United States, other than those arising from duties on impost and tonnage; and is to execute such other services, conformable to the Constitution of that department, as shall be directed by the Secretary.

The *supervisor* has the appointment of the collectors, and other inferior officers; and the collection of the internal revenue is to be made under his management.

Thus, it appears, that the collection of the internal revenue, is committed to the management of the supervisor, subject nevertheless, to the control and superintendence of the Commissioner of the revenue, who, in his turn, is under the control and superintendence of the Secretary of the Treasury. In this case, not only the before-mentioned revenue officers, but the law officers of the United States, were engaged in some way or other, in the transaction which is put in issue. The supervisor, or manager of the internal revenue, in relation to the collection, agreed to give Nichols six, twelve, and fifteen months' indulgence, for paying what was at that time due to the United States, in consideration of receiving from him certain securities. The Commissioner of the revenue, under whose superintendence this officer was, approved of the measure; and the Secretary of the Treasury, with full knowledge of all that had been done, if he did not expressly approve, he evinced no disapprobation of what the supervisor had done, and certainly did not attempt to control him. The supervisor directed a suit to be brought on the mortgage, which was done, for the use of the United States, in express terms, and the money was raised.

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The supervisor received upwards of 9000 dollars, part of the money secured by the mortgage; and the District Attorney took out of Court between two and three thousand dollars, other part of the same; and the United States, by its officers, are now contesting with the state of Pennsylvania, the right to the residue.

After all these acts of the officers of the government, all acting within their proper spheres, it is too much to deny, that they are to be imputed to the United States, and to be considered as the acts of the United States. As there is no proof given on the part of the United States, that the sureties knew of, or consented to the arrangement made with Nichols, the fact must be taken as it is stated in the defendants' rejoinder. Consequently, your verdict must be for the United States, on the first issue, and for the defendants, on the second issue; subject to the opinion of the Court on the point reserved, whether the two sureties of Nichols had not been discharged, by the United States having taken the bonds and mortgages of Nichols, in which time was given for the payment of the debt, due by him to the United States.

*The jury found accordingly.*

Afterwards, the question reserved for the decision of the Court, having been argued, the Court gave the following opinion.—

The point reserved for the consideration of the Court is, whether the act of the supervisor, in extending the time for payment of the debt due from Nichols, the principal in this bond, discharged the sureties? The principle of law, established by the cases of 1 Selwyn's Nisi Prius Cases, 311-12-14. 2 Vez. Jun. 540. 2 Brow. Ch. Rep. 579. 2 Bos. & Pull. 61. 3 Idem. 365, is, that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both in equity and at law. The reason is an obvious one. The surety gua-

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warrants the performance of the particular contract to which he is a party, and no other. If, without his consent, this contract be varied by the act of the creditor, he is not bound by the new contract; and the old contract cannot be enforced, according to the terms of it, without injustice to the principal, and a breach of the agreement made between him and the creditor. The surety, not being himself the debtor, but in relation to the obligation of his principal, has no right to prevent the creditor from indulging the principal, to any extent the creditor may please; but, as such indulgence cannot be granted at the risk of the surety, the only legal or equitable consequence, which can result from the indulgence granted to the principal, is, to discharge the surety from his engagement.

Should the surety call upon the creditor, as he undoubtedly may, to bring suit against the principal debtor as soon as the debt becomes due, and in case of refusal, to ask the aid of a Court of Equity to compel him; or should he even pay the creditor, with a view to sue the principal earlier than the period to which the new agreement had extended the credit;—the creditor, in the first instance, could not obey the call, nor could the surety, in the other, sue the principal without a violation of the second agreement. The inevitable consequence, therefore, must be what has been before stated.

It was contended on the part of the United States, that the rule does not apply, where the condition of the surety is improved by the extension of credit, granted in consideration of additional security for the debt. The answer to this argument is, that whether the security is bettered or not, was a consideration for the surety to decide upon; and the Court has no right to inquire into, and to weigh the good or the bad which might result from the new contract. It would lead, most certainly, to a vast variety of speculation, on which no sound principle could be built. In this case, it led unfortunately to the very loss which is now endeavoured to be fixed upon the shoulders of the surety. The principle on which the rule is



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founded, is not that the change of the contract, is upon calculation more or less beneficial to the surety, but that the contract, the performance of which was guarantied by the surety, has been changed without his consent.

Again, it was contended that the cases cited, do not apply to bonds with collateral conditions, but to such only as are expressly for the payment of money. How there should be a distinction, between the one kind of obligation and the other, is not perceived by the Court. In both, the responsibility and the rights of the surety are the same, and the principle of the rule, equally protects him in both. In the one, he guaranties the performance of certain acts, for a breach of which damages may be recovered; and in the other, the payment of a specified sum: but in neither, is he bound to guaranty any other contract, than that to which he is a party; and of course, the principle which discharges him, in case that contract is varied, in the one case, must discharge him in the other.

But, in this case, Nichols, at the time he was dismissed from the office of collector, was indebted in a specified sum to the United States, which he was then bound to pay, and for which a suit might immediately have been brought. The surety had a right to insist that a suit should be brought. But the United States, being, by an act of a public agent, disqualified from obeying such a requisition, had it been made, the surety was discharged.

*Judgment for defendant.*

## THE UNITED STATES vs. SMITH AND OTHERS.

Indictment against the defendants, part of the crew of the vessel. First count, for confining the master; and the second count, for endeavouring to make a revolt in the ship; both charged to have been committed on the high seas.

*It seems*, that to constitute the offence of endeavouring to make a revolt, the attack on the master should be accompanied by some evidence, indicating, on the part of the assailants, an intention to take possession of the vessel.

Any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law.

The offences charged against the defendants, were committed whilst the vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about one mile and a half wide at the mouth; and the Court were of opinion, that they had jurisdiction of the case. (Notd.)

THE indictment is founded on the 12th section of the Act of Congress, for the punishment of certain crimes, passed 30th April 1790, and contains two counts; the first for confining the master, and the second for endeavouring to make a revolt in the ship; both of which are charged to have been committed on the high seas.

The evidence in support of the indictment, was, that whilst this vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about a mile and a half wide at the mouth, the defendant, Smith, who in the course of the day had been struck by the captain, laid hold of him, and cursing him, observed, "now we are ready for you." The captain pushed him away, and ordered him forward; upon which Smith struck the captain, and they immediately closed

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The United States vs. Smith et al.

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with each other, when Smith cried out to the hands who were below to come up, for that now was their time. Upon which, the other two defendants ran forward to his assistance, one of them armed with an iron shovel, and the other with a piece of wood, and the one with the shovel struck the captain; after struggling for some time, the captain got clear from them, and got on the other side of the cabin, and ordered the men to go on the quarter deck, which they did, but still continued to abuse him, and threatened, if he came on the main deck, they would massacre him. After keeping the quarter deck for some time, and fearing to risk himself on the main deck in order to get into the boat, he got over the railing of the quarter deck, jumped into the boat, in which he went on shore, and having got a guard of soldiers, he returned to the vessel, where the defendants were armed and prepared to receive them; having during his absence declared, that they would resist the captain if he brought other masters of vessels to assist him, but that they would yield to soldiers, should they come with him; and that should he bring sailors with him, they expected that they would join them. They were, however, quelled and disarmed by the soldiers.

The counsel for the defendants, requested that the point, whether this indictment could be supported, the offence having been committed in a river, and not on the high seas, might be reserved; the Court directed the jury, if they should think the defendants guilty, to find them so, subject to the opinion of the Court on a point reserved.

The evidence on the part of the defendants, was, to a great degree, contradictory to that given in support of the indictment, giving it rather the appearance of a battery by Smith alone, in return for a stroke first given by the captain. As to the threat to the captain, if he came on the main deck, the testimony was equally at variance with that given against the defendants.

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The United States vs. Smith et al.

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*WASHINGTON, Justice*, charged the jury. As to the second count, for endeavouring to make a revolt, the Court feels some difficulty; but are inclined to think, that the attack upon the master, should be accompanied by some evidence, indicating, on the part of the assailants, an intention to take possession of the vessel.

There is less doubt as to the law upon the first count. Any confinement, whether by depriving the master of the use of his limbs, or by shutting him up in the cabin, or by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law. In this case, the master, as he states, was prevented, by an apprehension that the defendants would execute their threats, in case he went on the main deck, from getting into the boat from thence, and thought it necessary for his personal safety, to endeavour to get away from the vessel; and in order to do so, was compelled to get over the railing of the quarter deck, and thence into the boat. If this evidence is believed by the jury, the defendants are clearly guilty under the first count. If the evidence on the other side is believed, they cannot be convicted upon either count of this indictment.

The jury found the defendants guilty—subject to the opinion of the Court, on the point reserved.

*Norris.* Upon the point reserved, the Court was of opinion, that the case is within the jurisdiction of the Court. For, if rivers, havens, &c., be not parts of the *high seas*, still, the 12th section, where it speaks of the *high seas*, is confined to manslaughter, and does not extend to this offence. Sentence passed on the defendants.

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 Lessee of Lewis vs. Meredith.
 

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## LESSEE OF LEWIS vs. MEREDITH.

The law of Pennsylvania relative to titles to land under application, warrants, surveys, locations, payment of purchase money, and the rules established in the land office, relative thereto, by which such titles are ascertained and determined.

Land, held under a special warrant, may be levied upon under a *feri facias* and sold under a *venditioni exponas*; but land held under an indescriptive warrant, cannot be so levied upon.

**PLAINTIFF'S title.** An application by E. Slocum, 12th of February 1793, for 400 acres of land, in Luzerne county, on the east side of Susquehanna, and the north side of Wyalosing creek, about six miles from the mouth of the creek, and fifty perches from the creek; adjoining a manor line of William Penn on the west, and lands of John Shee on the south, and vacant lands on the east and north. Also, twenty-nine other tracts, of 400 acres each, in the names of different persons, adjoining said tract of Slocum; the first of them, on the east of said tract, and the others adjoining and adjoiners. The purchase money was paid by Eddy for the above lands, 10th of June 1794, and regular deeds made from the different applicants to Eddy, 5th of May 1795. Warrants issued to the several applicants, dated as of the day of the application, which agree with the applications, except that in Slocum's, the leading warrant, the words, "and lands of John Shee," are omitted. These warrants were surveyed on the 13th of August 1804, though different from the calls of the warrants, and were accepted 23d of August 1805, into the land office.

Under a *feri facias* against Eddy, the sheriff returned that he had levied on two-thirds of thirty tracts of land, on Wyalosing, Wysock and Rummer's field run, in Luzerne county, without any further description. A *venditioni exponas* issued,

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Lessee of Lewis vs. Meredith.

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and the sheriff sold and conveyed to the lessor of the plaintiff, the thirty tracts of land, held under the above warrants, describing them. This conveyance was on the 10th of September 1801.

Defendant's title. 11th of December 1793, application by P. Smith, for 400 acres of land, on the waters of Wyalloosing, to be bounded on the east by land granted to P. Decker, by warrant of 3d of April 1792, on the north, by land granted to T. Yerkes by warrant of 14th of March 1793, and to extend south and west in the county of Luzerne. Also, twenty-five applications in different names, adjoining the former as the leader, and each other. The purchase money for the above twenty-six tracts, was paid by the defendant, on the 17th of January 1794, and warrants issued, as of the 11th of December 1793. In February 1794, these warrants were put into the hands of a deputy surveyor to execute, who completed these surveys, from the 18th to the 25th of June 1794, and returned them into the land office, in September 1794. On the 12th of August 1794, Eddy caveated the defendant, which was tried 6th of April 1795, by the Board of Property, who determined that the defendant's surveys should be accepted, they being better described, the purchase money paid, and surveys made, before Eddy's warrants were put into the surveyor's hands to execute; and ordered a patent to issue. Eddy, within six months from the time this decision was made, brought his ejectment against the defendant for these lands, which was contested till 1804, when Eddy suffered a nonsuit.

The plaintiff's survey covers the lands claimed by the defendant, under the twenty-six warrants; and about one or two years after the above nonsuit, this ejectment was brought.

Binney, for the plaintiff, contended—1. That an execution might well be levied on this land, before they were surveyed, and upon any contingent or equitable title. 3 Binney 4. 1 Cra. 134.

2. That it is no objection to the plaintiff's surveys, that the

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 Lessee of Lewis vs. Meredith.
 

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tracts are not in oblongs, as mentioned in the law, whose length is double the breadth; that law being only directory, and applying only in cases of lands located on water courses, or where third persons are concerned.

3. That the plaintiff's application is sufficiently certain, at least in four respects; and if not so, it is as certain as the defendant's, and more so, since his land as surveyed, is a considerable distance from Wyaloosing; and even if more precise, still his survey is worth nothing, as it appears in evidence, that the surveyor did not survey it on the ground, or run his lines so as to enclose any land. 1 Binney 148. 3 Idem. 96. 114.

Gibson and Tighman, for the defendant, contended—

1. That if the plaintiff ever had a title, he lost it by laches, in not paying the purchase money, and having his survey made in a reasonable time. 2 Smith's Laws of Pennsylvania, 205.

2. That the plaintiff's application is uncertain, and did not apply to the defendant's land, and was not surveyed according to its calls, and could not be so surveyed.

3. After the decision of the Board of Property, the plaintiff's survey could neither be made nor accepted.

4. A levy cannot be made, on land merely claimed by an in-descriptive warrant.

5. The Board of Property having decided the question, that decision is conclusive, under the 11th section of the Act of 3d April 1790, unless the plaintiff had recovered in an ejectment, brought within six months after. But he was nonsuited, and did not bring his second ejectment for more than a year after.

In this case, it was proved and admitted, to be the custom in the land office, to allow a person, who has filed an application, to alter it as he pleases, at any time before the warrant issues; but, in that case, the application is considered to be made, as of the day the alteration is made, and the warrant is dated as of that day.

Ingersoll, in reply, contended, that the 11th section of the

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 Lessee of Lewis vs. Meredith.
 

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Act of 3d. April 1793, applied only to lands north and west of the Alleghany, Ohio, and Conewango creek, and not to this land; all the sections of the law, except the first, reducing the price of the lands, clearly refer to those lands; and therefore, the decision on the caveat is not conclusive. But, if it were, still it is not so, unless the decision of the Court in the ejectment is on the title; and such must be the certificate, to authorize the patent issuing, but not if a nonsuit is suffered, as in this case, in consequence of the Court countenancing the idea, that the plaintiff must prove the defendant in possession, contrary to the express provisions of this section, if it does apply.

*WASHINGTON, Justice, charged the jury.* In stating to you the opinion of the Court on this case, we shall first consider the title of *Eddy*, under whom the plaintiff claims, and then the title of the plaintiff.

In order to a clear understanding of the principles on which this cause must be decided, it will be necessary to examine the different steps taken by *Eddy*, for the purpose of appropriating the land in question. On the 13th of February 1793, he made an application to the land office. What is the extent to which this step carries the party, in acquiring a title? It is a declaration on his part, of an intention to make an appropriation. The state, on her part, impliedly agrees, that the applicant may obtain a title to the land specified in his application, upon the terms of his paying the purchase money, and proceeding regularly to complete that title, by having a survey made, and obtaining a patent. If the applicant specifies with sufficient certainty, the land he means to appropriate, the application is called a special one, and the warrant which he obtains is termed a special warrant. If he cannot, at the time he makes the application, designate the tract with convenient certainty, he obtains by his warrant a right to a certain quantity of land, to be fixed and located at a future day, by a survey, and this is called a general warrant. The former amounts to a location



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immediately; the latter, to a location when the survey is made and returned. After the application is made, it is expected that the applicant will proceed with all convenient speed, to pay the purchase money, which being done, the warrant to the surveyor issues, but not before; and though it bears date, as of the day of the application, it is, in fact, and in truth, a warrant of the day on which the money is paid. It is further expected, that he will, with reasonable diligence, proceed to perfect his title, by having a survey made. But, if he neglects to pay the purchase money, and take out his warrant, for any length of time, unless quickened by a special law, as in this case, his title, as between him and the state, is not jeopardized; because the state compensates herself for tying out of the money, by compelling him to pay interest. So, too, as between the state and the individual; the delay of the latter to make his survey, is no otherwise important, than as it may defeat the policy of the state, in having her lands settled and improved. But this is not important, if no other person wants to settle it. But, if another person applies for the same land, the case is entirely altered, and very different consequences result. The second applicant, has equal equity with the first, to appropriate this vacant land; and if he pays his money, and proceeds regularly and with due vigilance to perfect his title, he defeats the equity of the first applicant, and is entitled to a priority, because he pays his purchase money, and obtains a legal title to the land, which is a step towards promoting the political views of the state, in getting her vacant lands settled and improved. Since, then, the equity of the first applicant, may be defeated by his own neglect and the superior vigilance of the second applicant, in determining which of the two is entitled to a preference, the jury, where the application is special, must inquire and decide whether the first applicant has proceeded with due diligence to consummate his title; and in doing this, they must adopt some rational rule to guide their judgments. Can a postponement of payment of the purchase money, for sixteen

part of the location can be laid to the south-west of John Shee, without running in considerably upon the manor land.

This uncertainty, however, in the application, may be remedied by the survey. But, then, the title of Eddy, in relation to one, who, in the mean time, had regularly obtained a title to the land, covered by the subsequent survey of Eddy, must date from the survey; because the survey of an uncertain warrant, can never, by relation to the date of the application or warrant,oust one, who, in the mean time, has regularly acquired a title to the same land. This, necessarily, brings into view the title of the defendant; and it is contended on the part of the plaintiff, that his survey was irregularly and illegally made, the surveyor not having gone round the boundaries of the land, so as to enable him to make a plat of the same, and the evidence of a person deputed at one time, to make this survey, which is to this effect, is relied upon. The fact may possibly be so. But one thing is clear, and that is, that a survey, with every appearance of accuracy, as if every tract had been regularly run, was returned by the surveyor, sworn to, was contested sixteen years ago, before the Board of Property, by Eddy, and then determined to be regular, and as such was accepted. Now, it would violate every principle of equity, to admit Eddy, who, to say the best for his title, had only an equitable estate, with full notice of the defendant's survey, to defeat by his survey, made nine years afterwards, the title of the defendant, thus supported by the decision of the Board of Property, upon the mere ground of irregularity in the survey, even if the fact were clearly made out. But, it is said, that the plaintiff is a purchaser for a valuable consideration, and is not bound by the notice to Eddy. But still he was the purchaser of a naked equity—was a *pendente lite* purchaser—and what is more, was affected by constructive notice, which the return of survey gave him. This point, then, is conclusive, in favour of the defendant.

3. As to the title of the *plaintiff*. If the doctrine endeavour-

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License of Lewis vs. Meredith.

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ed to be maintained, under the second head, be correct, then, this land could not be levied upon, and of course, could not be sold and conveyed by the sheriff. For, whilst it is conceded by the defendant, that lands held under a special warrant, may be levied upon and sold, it is with equal candour admitted on the other side, that land held under an ipodescriptive warrant, cannot be. And surely nothing can be more obvious. Whether such a warrant may be taken in execution, is a point not necessary to be decided. If it can, nothing is taken but the evidence of a right to land somewhere, and to be afterwards designated by survey. But land cannot be levied on, because, until it is surveyed, it exists only in idea—it has no locality—no real existence. This execution was levied on thirty tracts of land; and even if these were the thirty tracts actually intended, still, they were not the property of Eddy, any more than any other tracts of land. This point, therefore, is also against the plaintiff.

*The plaintiff consented to suffer a nonsuit.*

## Penn's Lessee vs. Ingman.

**Ejectment.** The order of the proprietaries to survey the land in controversy, was dated in August 1773; and the survey was made, and returned into the land office, in October 1774. The defendant claimed title by possession in 1789, and subsequent settlement and improvement. This ejectment was brought in 1805. The objection to the plaintiff's title was, that all the lines of the tract had not been run, and that the plaintiff was barred by the Statute of Limitations.

The defendant, who appears with no title, except possession and improvement made after the survey, who is a mere intruder on land long before appropriated, is not a person whom the laws of the state favour.

In 1774, and long afterwards, there was no positive law requiring the surveyor to make an actual survey, by running and marking all the lines; if, from old lines and natural boundaries, the necessity to run all the lines did not exist, no objection could legally be made to the survey.

The Act of Limitations did not begin to run, until the plaintiff's lessee was ousted, or adversely kept out.

The meaning of the Act of the Legislature of Pennsylvania, of 26th March 1785, section third, is this:—If, at the time the law passed, a person was dispossessed, he was bound to bring his ejectment within fifteen years; but if he was afterwards dispossessed, the Act of Limitations, which would begin to run, would not be a bar in less than twenty-one years.

**THE** plaintiff proved an order of the proprietors to the surveyor, to lay off 10,000 acres for the proprietors, on both sides of Wyalloosing creek, and east of the Susquehanna, dated August 1773; for which, a warrant to the Surveyor General issued, in September 1773; and a survey was made, on the 4th, 5th, and 6th of October 1773, and returned into the land office, on the 31st of October 1774.

The evidence of the return, was an abstract from a book, remaining in the Surveyor General's office, containing a list of deputy surveyors' returns, certified to be a true copy, by the

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 Penn's Lessee vs. Ingham.
 

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Surveyor General. The entry is thus, "31st of October 1774, Charles Stewart to John Lukens. The Hm. Proprietaries, 3520 acres, 12 17s. 6d." Proof was given, that this is the usual evidence of a return of survey to the Surveyor General, by a charge against the deputy who made the survey; and the Act of Assembly of 9th April 1781, S. 3, making the book from which this extract was taken, a book of record.

The evidence was objected to, but admitted by the Court, to be left to the jury, as evidence of a return.

Evidence was given, to prove that this manor, called Dundee, has, since the year 1774, been always called and reported a manor. .

Strong evidence was given to show, that this manor was regularly surveyed on the ground; positive, as to the line on Susquehanna, and all the lines on the north of Wyalosing, it being called for, and adjoined by John Shee on the east, and its calling for one Smith, on the line from Susquehanna, crossing the creek and running south. The defence was, that the survey had not been regularly made on the ground, and the lines actually run on the south of the creek; and to prove this, one of the chain carriers, who, at one time went with the deputy surveyor to make this survey, stated, that the surveyor did not then cross to the south of the creek. Two other witnesses stated, that they had, within a few years past, made *ex parte* surveys of the manor, and could not find marked lines on the south side; but, it appeared that one of them missed one of the corner trees, and the other, who found an old line on the south, did not follow it, because it was not in the precise direction of another line, at the extremity of the number of poles called for, but two poles short of it. The plat made by one of these surveyors, was read without opposition. The other, ran pretty nearly the courses and distances, on the south, which extended about six miles, in all, and hit the beginning tree on the river.

The defendant set up no title but possession, in 1799, and a

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subsequent settlement and improvement. The labors of the plaintiff, were in this state in 1785, and 1787. This ejectment was brought in 1805; and it was contended, that the plaintiff was barred by the Act of Limitations, the suit not having been brought within fifteen years after the 26th of March 1785, when the law passed, under the third section, or within twenty-one years from the year 1774, when the plaintiff's title accrued, they being then in Pennsylvania.

*Washington, Justice.* There is nothing in the objection of the Act of Limitations. It never began to run, until the plaintiff was ousted, or adversely kept out, which was not prior to 1789; and from that time, the plaintiff was not barred, before twenty-one years had run out. The meaning of the law is this:—If, at the time it passed, a person was disseised, he was bound to bring his action within fifteen years. But, if he was afterwards disseised, the Act of Limitations, which would then begin to run, would not be a bar, in less than twenty-one years. In this case, therefore, the suit was brought long within the twenty-one years from the time of the ouster, if, in fact, there was one.

*WASHINGTON, Justice,* charged the jury. The only contested point is, whether the survey of this manor, was duly made within the true meaning of the Act of 26th November 1779. The other requisites of the eighth section, are not contested.

The plaintiff appears with a regular paper survey, made, and returned, by a proper officer, and he is told by the defendant, who does not pretend to any title, other than that of possession, settlement, and improvement, made sixteen years after the survey of the manor was made, that this survey was not regularly made. If he set up a right in himself, by survey or settlement, when the plaintiff's survey was made, there might be some reason, in a defendant thus circumstanced, making such a defence. But it seems strange, that a mere intruder, the

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such is the defendant, since his settlement being made upon land, then, and long before appropriated, he is not one of those persons, whom the laws of this state favour,) should be permitted to protect his possession, by questioning the regularity of the plaintiff's survey. At the time that survey was made, and long afterwards, there was no positive law of this state, which required that the surveyor should make an actual survey, by going on the ground, and running and marking all the lines. There was a propriety, and even a necessity, that this should be done, in cases where the lines could not otherwise be laid down; and this, the public, and particularly the individual whose warrant was to be located, had a right to expect from this public officer. But, if from former lines, or natural boundaries, known to the surveyor, he was enabled, by running some of the lines, to lay down the other lines of the survey, with accuracy, where was the necessity of going over all the lines on the ground? If the warrant was special, no actual survey was necessary. Even the Act of 1785 does not declare a survey void, if not actually made on the ground, although it directs the officer to run and mark the lines on the ground.

But, suppose an actual survey, necessary to the validity of the title, it is admitted, that the presumption, that this was done, is so strong in favour of the survey returned, as to require clear evidence from the person who would impeach it, in order to repel such presumption; and, we will add, that it should be very clear and direct, where that presumption is fortified by the antiquity of the survey.

The testimony of the chain carrier, in this case, is entirely negative, and proves only that, at the particular time he speaks of, the lines on the south of the major were not run by the surveyor for whom he carried the chain. But it does not follow, that those lines were not run at the same time by another surveyor, or that they were not afterwards run, or had been previously run; such evidence as this, is too weak, to be set in opposition to the presumption in favour of the survey. As to

the evidence of the two surveyors, who could not find the lines on the south of the creek, it ought to have very little, if any, weight in the case; because the surveys they made were *ex parte*; and if the plat they produced had been objected to, the Court would for this reason have rejected it. If notice had been given to the plaintiff, and accepted, and they or their agent had attended; or if the survey had been made under an order of this Court, although the plaintiff had not attended, being duly notified of the time and place of that survey, and the testimony of these men, might have been important. But, even by their own showing, they failed to trace the lines on the south; one of them, by not finding an important corner, and the other, very probably, by not following the old line of marked trees.

But what seems conclusive is this, that it would seem impossible for a surveyor, by running the lines on the north of this creek, without having also got the precise course of the creek, to plat by course and distance, the lines on the south, not parallel with those on the north; and to do all this with such accuracy, as for it to turn out, on actual experiment, precisely right, as it appears this did, by the evidence of one of these very surveyors.

*Fordist, Judge of the Court.*



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The United States vs. Mitchel et al.

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THE UNITED STATES vs. MITCHEL & WOODRUFF.

Debt on a bond given under the Embargo Laws. The question on the evidence was, whether the defendants were prevented by *perils of the sea*, from performing the condition of the bond. It was alleged, that the vessel was, by perils of the sea, driven into St. Thomas; and that when there, the authorities of the island obliged the master to sell her cargo.

The certificate of the governor of St. Thomas, (the signature being proved,) without a seal, given at the time the captain petitioned for leave to depart with his cargo, that such petition was refused; is an official act by a person, who, it is probable, would not give a deposition, and is different from evidence of matters not official, and may be read in evidence.

The log-book was allowed to be given in evidence, in proof that the bills of lading had been made out from it; the witness declaring he was perfectly sure it was the log-book kept on the voyage, although he did not recollect having seen the mate make regular entries in it; and also, that every exertion had been made, to procure the attendance and testimony of the mate.

The rule, in the United States vs. Dixey et al. (*ante* page, 15.) condemned by the Court. If the vessel was not seaworthy, the injury done to her or to her voyage by *perils of the sea*, will not excuse the defendants, who should clear themselves from all imputations of this kind; but the rule as to seaworthiness, ought not to be more strict in such cases as this, than in cases of insurance. It is sufficient, if the vessel were seaworthy for the voyage upon which she was destined; and the want of this, must be proved by him who affirms the fact, if sufficient causes for her disability, such as *storms*, &c., are proved. *Aliter*, if no such cause appears.

**DEBT** on an embargo bond; and the question on the evidence was, whether the defendants were prevented by *perils of the sea*, or other unavoidable accidents, from landing their cargo at some port in the United States? The voyage was from Philadelphia to Charleston and Savannah.

The night of the day after the pilot left her, she was exposed

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to a violent storm, which continued, with some intermissions, for some days. She suffered greatly in her masts and rigging, insomuch, that she was compelled to keep before the wind; and the winds continued so adverse, that it was stated by a witness, that it was not possible to make a port in the United States. The log-book strongly supported this statement. She went into St. Thomas, where she was unladen by order of the judge, upon a report of surveyors; and was prevented, by a general prohibition of the government of the island, from carrying away the cargo, which consisted of provisions. It appeared, by a certificate of the governor of the island, whose signature was proved, but to which there was no seal, which certificate was given at the time the petition of the captain was made to him, for leave to take away the cargo, that it was refused.

This certificate was objected to. *By the Court.* The certificate is of an official act, given at the time, by which it appears, that the captain had petitioned for leave to take away the cargo, which the governor refused. We know no way by which that fact could be better proved, than by this certificate, unless the deposition of the governor had been taken, which it is not to be supposed he would have consented to give. This is very different from evidence of matters not official, in which latter case, such a certificate could not be admitted.

The log-book, (which was not admitted at the former trial, Vol. II. p. 478,) was now admitted upon this additional evidence, that in relation to the cargo taken on board, the bills for landing at St. Thomas, were made out from this book, which the witness declared he was perfectly sure was the log-book kept on that voyage, though he did not recollect seeing the mate make entries regularly in it; and upon this further proof, that advertisements had been inserted in two papers in this city, shortly after the last trial, requesting information where the mate was, as by calling at a particular place, he would hear something to his advantage. This book is now better identifi-

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ed, than it was at the last trial, and due diligence has been used to obtain better evidence than that of the mate himself, without success.

*WASHINGTON, Justice*, charged the jury. Something has been said, about the want of seaworthiness in this vessel. If sufficient proof of her want of seaworthiness for the intended voyage, has been given, to the satisfaction of the jury, it is fatal to the defence; because, the defendants, to entitle themselves to the excuse they set up, should clear themselves from all blame in respect to the accident which prevented their complying with the condition of the bond.

But, in respect to seaworthiness, the rule, in a case of forfeiture, must not be more rigid than is laid down in actions on policies of insurance; and that is, if the vessel, without any apparent and sufficient cause, begins to leak, and to show herself unfit to perform the voyage, the presumption is that she was not seaworthy when the voyage commenced; and the person who affirms she was so, must prove it by sufficient evidence. But, if a sufficient cause for her leaking is proved, as the existence of severe weather, as in this case; the burthen of proof is thrown upon the party who affirms that she was not seaworthy when the voyage commenced. Whether any such evidence has been given by the United States, you are to decide. The question is, not whether she was sufficiently staunch and strong, and sound for any voyage, but for this voyage?

Another argument used by the District Attorney, was, that when the accidents happened, which compelled her to go before the wind, she ought to have returned to Philadelphia. If at this time it was apparent that she could not make a southern port, and that she could get into a more northern port, she certainly was bound to do so. This was formerly determined in a case in this Court; because, in that case, the vessel not being able to lay to the wind, so as to make a southern port, on account of the want of ballast, and having performed

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ed but a small part of her voyage, it was decided, that the master ought to have returned, and gone somewhere to supply his original omission. But in this case, there was no reason to suppose, that this vessel could not make a southern port, in consequence of the injury to her masts, nor does it appear, that she could not have done it, had the winds favoured. She had performed much the greatest part of her voyage, and was driven from the coast by westerly winds; so at least is the evidence. The law, in such a case, did not impose on the defendants the necessity of returning, so long as they could fairly hope, with favourable winds, to reach the port of their destination.

As to the facts of the case, the Court will only say, that if you credit the evidence given of them, the defendants have fully brought themselves within the exception provided in their favour.

*Verdict for defendants.*

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The United States vs. Brockius.

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## THE UNITED STATES vs. BROCKIUS.

A person who had been convicted in the Court of this state, of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness.

If incompetency, produced by the conviction of a witness, depends on the *punishment*, and not the nature of the offence, yet where an infamous punishment, in the discretion of the Court, is not added, there is no disqualification, because it might have been inflicted. Fine and imprisonment is not an *infamous punishment*.

**INDICTMENT** for smuggling. One of the witnesses, in favour of the prosecution, was objected to, on the ground, that he had been convicted of an assault and battery with intent to murder, and had been sentenced to pay a fine, and to six months imprisonment, as appeared by the record produced in evidence.

Levy, for the defendant, read the following cases:—Co. Lit. 6. 13. Kel. 37-8. 2 Wils. 18. 2 Bac. 583. 4 Blac. Com. 217. 1 East's C. Law, 407.

Dallas read M'Nally, 206 et seq.

*By the Court.* The punishment of this offence at common law, is fine and imprisonment, and frequently the pillory is added; but it seems to be in the discretion of the Court. In lieu of the common law punishment of branding, whipping, and pillory, the penal code of this state, has substituted confinement and hard labour. Now, even if the incompetency produced by conviction, depended on the punishment, instead of the nature of the offence; where the infamous punishment forms no part of the sentence, there would be no disqualification, because it might have been inflicted. In this case, the punishment by

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fine and imprisonment, is not to be considered as an infamous punishment, so as to render the witness incompetent.

The case was left to the jury, on the evidence, who found the defendant not guilty.

*Note.* *Quere per Washington*, whether, in any case, the statutory punishment, by confinement to hard labour, will destroy the competency of the witness, unless the crime is infamous?

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 Clark vs. The United States.
 

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## CLARK vs. THE UNITED STATES.

The island of St. Domingo is a dependence of France, and within the Act of Congress of March 1st 1809.

It is for the government of the United States to decide, whether this island is independent or not; and until such a declaration is made, or France shall relinquish her claim, the Courts of the United States must consider the ancient state of things as remaining unaltered, and the sovereign power of France over the country as still existing.

The surrender of a town to an invading enemy, does not divest the sovereignty of more country than that which has submitted to the conqueror. If the whole island of St. Domingo had been conquered by the British, and given up to the Blacks, the right of France would have revived; since the conqueror gains nothing but the temporary right of possession and government, until a pacification; and cannot, in the mean time, impair, by any transfer, the rights of the former sovereign.

## APPEAL.

*WASHINGTON, Justice*, delivered the opinion of the Court: These cases arise under an Act of Congress, passed on the 1st of March 1809, which prohibits the importation into the United States, of any goods, &c., from any place situated in France or Great Britain, or in any of the colonies or dependencies of either; and the question is, whether the island of St. Domingo, in October 1809, when the importation charged in this information was made, was a colony or dependence of France, or not?

On the part of the United States, it is contended, that in point of fact, this island, at the time above mentioned, was, and still continues, a dependence of France; and that even if this were not the case, according to the principles of the law of nations, still, it is not for this, or any other Court, to decide

## Clark vs. The United States.

on the ground of her independence, until the government of the United States has so declared, or France has relinquished her claim.

On the part of the claimant, it was insisted, that the people of this island ~~had not only declared themselves independent,~~ but have thus far shown themselves able to maintain it; having, ever since the declaration, exercised without interruption from the armed force of France, the rights and powers of self-government, under a constitution framed by themselves. That neutral nations are bound, by the law which ought to govern nations, to consider St. Domingo as a government separate from, and independent of France; and the war, if any there be between them, as being equally just on both sides. That the law of nations, is as much obligatory, as a rule of decision, upon Courts, as of conduct on sovereigns; and consequently, in all questions coming before these tribunals, where the relations between the dismembered part and the mother country, are incidentally brought in question, and must be decided, the former must be considered equal in all respects with the latter, although the sovereign power may have made no declaration upon the subject. As an illustration of these principles, the case of a seizure and condemnation in a Court of the new government, as prize, or for breach of a municipal law of that government, was mentioned, which a foreign Court would clearly be bound by the law of nations to consider as valid.

These arguments, on the side of the appellants, had great weight with us, when they were urged; and we must candidly confess, that they lost nothing by the examination which we have given the subject during the vacation. But they seem to us to be so completely borne down by the opinion of the Supreme Court, pronounced in the case of *Rose vs. Himely*, that it is impossible, we think, to sustain them, without disregarding principles most clearly expressed in that opinion.

That was the case of an American vessel, which, after trading with the brigands of St. Domingo, as they were termed,



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sailed with a cargo; and when at the distance of ten leagues from the island, on the high sea, she was captured by a French privateer, on the 23d of February 1804, was conducted into the island of Cuba, was sold, and afterwards condemned, in July 1804, at St. Domingo, under an arrest of the Captain-General Farnand, issued on the 1st of March 1804.

The Chief Justice, in delivering the opinion of the Court, whilst considering the particular character in which the Court at St. Domingo acted, in condemning this vessel and cargo, says, "the relative situation of St. Domingo and France, must necessarily be considered." He then proceeds to lay it down, that "St. Domingo had declared herself independent of France, and was by arms asserting her sovereignty;—a war *de facto* existed. Vattel, who has been quoted to prove that St. Domingo, having declared herself independent, and so far maintained it by arms, must be treated by other nations as such, in fact, and entitled to maintain the same intercourse with the world, as is maintained by other belligerent nations, addresses himself to sovereigns, not to Courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation; and till such decision is made, or France shall relinquish her claim, Courts must consider the ancient state of things as remaining unaltered, and the sovereign power of France over the colony as still subsisting."

In that case, the arguments urged in behalf of these appellants, were stronger than when applied to this case; because in that, the dependence or independence of St. Domingo, was only incidentally involved; whereas, in this, the Court is called upon, in construing an Act of Congress, to decide directly, that she is independent; for, if not so, then, the case is clearly within the law. The authority of the opinion just quoted, can lose nothing of its weight, from the circumstance, that, at the time when the vessel in that case was seized and condemned, the city of St. Domingo was in possession of the French; and that no efforts have been made, since her surrender to the arms of

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Great Britain and Spain, to recover the possession of the island, or any part of it. The superior maritime strength of Great Britain, accounts for this circumstance, and precludes all presumption of an implied abandonment by France, of her claim of sovereignty over the island. In the words of the Chief Justice, in the case quoted, "France has not relinquished her claim, nor has the government of the United States acknowledged the independence of the island."

One of the counsel for the appellants, sensible of the difficulty of clearing this case from the authority of *Rose vs. Himely*, endeavoured to avoid it, by considering the island of St. Domingo as a *conquered country*, belonging first to Great Britain, and by her ceded to Spain. But this ground is as difficult to be maintained as the other; because, it was never yet pretended, that the conquest of a town, or even of a province, divested the original sovereign of more than the country which had submitted to the conqueror; and consequently, no other part of the island passed by the surrender into the hands of Great Britain and Spain, but the town of St. Domingo; and even that is now possessed by the Blacks. We are inclined, indeed, to think, that if the whole island had submitted to the arms of Great Britain and Spain, and had by those powers been afterwards surrendered to the Blacks, the rights of France would have revived; since the conqueror gains nothing but a temporary right of possession and government, until a pacification; and cannot, by any transfer in the mean time, impair the rights of the former sovereign.

But, admitting the soundness of the arguments urged by the appellant's counsel, and that they stood uncontroverted by the decision in *Rose vs. Himely*; still, we apprehend, that in relation to the island of St. Domingo, they would be inapplicable. The Court is called upon to construe an Act of Congress, and to say, whether, within the meaning of the legislature, this island was to be considered as a dependence of France? Although there is nothing in the law itself, to decide this point, yet

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it is not improper to refer to the acts of our government, in relation to this island, in order to discover the light in which Congress viewed it. In pursuing this investigation, we deem it unnecessary to go further back into the revolution of St. Domingo, than to the 8th of July 1801, when a Constitution was framed by the people of this island, which was subsequently administered by Toussaint, as Governor, and Captain-General, under the French government; the supremacy of which, was repeatedly acknowledged by him, as chief of the colonial government.

Subsequent to that period, a civil war raged between this colony and France, which was carried on with various success until July 1809, when, by the surrender of the city of St. Domingo, the French army was entirely expelled the island; which has ever since remained in the possession of the Blacks, arrayed under different chiefs, contending with each other for the sole command. Previous, however, to this forced abandonment by France, this island was, in 1804, declared by the people to be independent; and the supreme executive power was placed in the hands of Dessalines, with the title of Governor-General.

Let us now see what has been the conduct of our government in relation to this island, since the period when it was claimed by France, as a colony, and acknowledged as such, by the colony. On the 26th of February 1806, Congress passed a law to suspend the commercial intercourse between the United States and such parts of the island of St. Domingo, as were not in the possession, and under the acknowledged government of France; which was continued in force until the 4th of March 1808. In the mean time, however, viz. in December 1807, the embargo laws, interdicting the commerce of the United States with all foreign nations, were passed, and consequently, rendered a further continuance of the former law unnecessary. This general interdiction of commerce continued until March 1809, when the embargo laws were repealed, except as to Eng-

land and France; and a non-importation law, as to these nations, their colonies, and dependencies, and places within their actual possession, was enacted; to take effect from the 30th of May following; which continued in force against France until a late period.

When the non-intercourse law passed, in February 1806, the island of St. Domingo was in a state of open public war with France; having declared herself independent, framed a Constitution of government, and shown herself able to maintain that independence. As an independent nation, the United States had an unquestionable right to carry on a commercial intercourse with that island. The attempt of any foreign nation to interdict such commerce, and still worse, a demand upon the government of the United States, to enforce such prohibition by law, would have been an insult, to which no nation ought, and to which our government most certainly would not have submitted. But it is well known, that the law of 1806, was passed in consequence of a remonstrance of the French government, made upon that of the United States, through her minister. The United States were at liberty to acknowledge the independence of St. Domingo, and to treat her as a sovereign power, or to refuse such acknowledgment, and to consider her as a colony and dependence of France. We view the law of 1806, under the circumstances which produced it, as a clear acknowledgment of the sovereignty of France over the island, which no subsequent act of our government, has in any respect impaired. When Congress, therefore, by the law on which this information is founded, interdicted the importation into the United States, of goods, &c., from the colonies and dependencies of France, we feel ourselves compelled to say, that St. Domingo was considered by that body as included. So that the government has not only not acknowledged the independence of this island, but has very plainly declared the contrary.

As to the evidence, we shall only observe, that the depo-

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sitions of Elisha Kane, James Handy, and W. Hunt, together with the acknowledgment of one of the claimants, in his petition to the Secretary of the Treasury, sufficiently prove, that the cargoes of both vessels, the Sea Nymph and the Emma, were imported from Port-au-Prince, to require exculpatory evidence from the claimants; which no where appears in the record.

*Sentence of the District Court affirmed.*

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Camac & Wife vs. Francis.

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## CAMAC &amp; WIFE vs. FRANCIS.

It is no reason, for referring accounts back to the commissioner, who made the report, that one of the parties suggests, that since it was made, he has obtained evidence in support of his exceptions; and that he expects he will be able to discover new debts and credits, not now known to him. The new evidence may be read, when the exceptions are argued.

ON motion of the plaintiff, the Court referred the accounts back to the auditor, so far only, as to report such further credits, as either party may prove himself entitled to, and which the other, on notice of it, refuses to allow. But the Court refused to refer the accounts generally, because of the suggestion, that the plaintiff had, since the last Court, obtained documents and evidence in support of his exceptions; and that he expected it would be in his power to discover new credits, not now known to him. As to the new evidence, in relation to exceptions which the Court has not yet decided upon, that can be received by the Court, without a reference to the auditor; and as to the additional credits, which the plaintiff only conjectures it may be in his power to discover, this affords no reason for the reference.

*Order made accordingly.*

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Richardson vs. Golden.

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## RICHARDSON vs. GOLDEN.

If the general interrogatory is not answered, by a witness examined under a commission, it is fatal to the deposition. A witness cannot be asked, if the facts stated in an *ex parte* certificate are true; he should be interrogated as to those facts particularly.

**W**ALLACE, for the plaintiff, objected to certain depositions taken under a commission returned from North-Carolina—1. Because there is no answer given to, or notice taken of, the general interrogatory, viz. "Do you know any thing further, material?" &c. 2. Because an *ex parte* certificate of facts, having been given by some of the witnesses, they were asked if the certificate contained the truth, instead of being interrogated as to the facts stated in it.

*By the Court.* Both objections are good. The first has been often decided here. The second is supported on this ground, that the mode pursued in this case, is calculated to produce perjury. It is worse than asking leading questions, or telling the witness what to say; because, he is here reminded of the necessity of swearing to what he has before stated, or of suffering in his credit. The answers to these questions cannot be read.

*The parties, by consent, withdrew a juror.*

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Jordan vs. Wilkins.

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## JOHN JORDAN vs. JOHN WILKINS JUNR.

The defendant offered in evidence, a receipt for money, to prove the same to have been paid by C. W. to the plaintiff, on account of the defendant. The Court refused to permit it to be read, as C. W. might, and ought, to have been examined, to prove that the money was paid by him, on defendant's account.

Although one partner is not bound singly, to pay a debt due from him and his partner, if, when sued, he plead in abatement, the omission to join his partner in the action; yet he is not entitled to recover in his own name a partnership debt; and if he sue in his own name, the defendant may take advantage of it on the trial on the general issue.

**ACTION** of assumpsit against the defendant, upon *indebitatus assumpsit*, for goods sold, &c., *quantum meruit*—money had and received, account stated, and money laid out and expended. The writ, as recited in the declaration, is against John Wilkins Jun. carrying on trade under the firm of John Wilkins Jun. & Co., but the declaration is against John Wilkins Jun. only.

It appeared in evidence, that on the 15th of December 1803, the plaintiff, the defendant, John A. Steitz, and Charles Wilkins, entered into an agreement, in writing, by which it was stipulated, that the plaintiff, Steitz, and Charles Wilkins, should each, upon his own account, and upon his own funds, conduct a store at Lexington, and the defendant, another at Natchez; each party to stand by any losses which he might encounter, without the others participating in it; but that whatever profits were made by either, after deducting his expenditures, should be equally divided between all. That the parties to be established at Lexington, should supply the defendant's store at Natchez with country produce; which he was to dispose of for the person sending it, free of commissions. The connexion to continue for four years.



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Soon after this, the defendant inserted in a newspaper at Natchez, a notice, signed John A. Steitz, that this connexion had taken place, by which each party was to keep a store, three at Lexington and one at Natchez; and that the store at Natchez, would be conducted by John Wilkins, under the firm of John Wilkins & Co.

Upon the death of Steitz, the surviving parties to the above contract, dissolved their partnership, and agreed that whatever profits or losses either party had made or sustained, should be enjoyed and borne by such person severally, and each to be liable for his own engagements; but that as to purchases made by Steitz, at Natchez, (not specifying what they were,) each party should be entitled to a fourth of the profits, and sustain a proportionate loss, if any.

The advertisement inserted in the Natchez paper, as above mentioned, has the signature of John A. Steitz to it, and on this account it was objected to by the defendant. But the tacit acquiescence of the defendant, strengthened by a letter from the defendant, strongly intimating that Steitz was authorized to give such a notice; was deemed by the Court sufficient to authorize the admission of the evidence, to be left to the jury.

The plaintiff offered to give in evidence an account current, by which John and Charles Wilkins acknowledge a large balance due to the plaintiff. In support of this item, it was contended, that if one of two partners is sued for a partnership debt, and he omits to take advantage of the other partner's not being sued, by a plea in abatement, the plaintiff may recover the whole against him; because he is severally as well as jointly bound. 5 Burr, 2611. The only exception is, where the obligation or contract appears on the face of the declaration to be joint, and that the other co-obligor is alive and can be sued. 1 Sand. 291. N. 4.

On the other side, it was said, that in the notice given by the plaintiff, of the account he should rely on at the trial, there are

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items against the defendant, separately, and against him as John Wilkins & Co., but none against John and Charles Wilkins; and that to such an action, the defendant could not have pleaded both in bar and in abatement.

*Washington Justice.* The principle laid down in the case from 5 Burr, 2611, is, that one co-obligor or co-contractor, cannot be charged singly, if, in due time, he takes advantage of the plaintiff's omission to sue the others, who are also bound, by giving to him a better writ; which, by a plea in abatement he must do. But, if he fail to protect himself by such a plea, he cannot turn the plaintiff round, at the trial, by proving that another is jointly bound with him, and he is himself bound, severally, as well as jointly. This principle is certainly correct, in every case where the plaintiff gives notice to the defendant, of the nature of his demand, so as to put it in his power to plead in abatement. In actions on bonds, or special actions on the case, the declaration gives notice, and the rule is strictly applicable. But in actions of general *indebitatus assumpsit*, which this is, how is it possible for the defendant to know, whether the plaintiff means at the trial to give evidence of a joint or several debt, or both; and, in this state of ignorance, how can he plead in abatement? Upon the face of the declaration, the claim is for a debt due from the defendant alone; and to permit the plaintiff to give evidence of a debt due from him and another, would be subversive of the rule, which declares that he shall not be made responsible singly, unless he has waived the privilege which the law allows him, of pleading in abatement.

We understand it to be the constant and established practice of this state, in actions of this sort, for the plaintiff to furnish the defendant, before he pleads, with a copy of the account which he means to offer at the trial. Where this is done, the defendant has notice as fully as if it had appeared on the face of the declaration; and we see no reason, why he may not shape his pleading, as if the declaration had been special, and plead

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in abatement. In this case, the account delivered by the plaintiff to the defendant, contains no item of a debit against John and Charles Wilkins; and, therefore, the defendant could not have known that such evidence would be offered at the trial, so as to put it in his power to plead in abatement.

It is very clear, that the defendant cannot plead in bar to a part, and in abatement to other parts of the action. And it is equally clear, that if the plaintiff joins in the same declaration, inconsistent counts, such as against the defendant singly, and against him as partner with some others, he must avail himself of this, by demurring to the declaration; because, if he would take advantage of his partner not being joined in the counts where he is sued for a partnership debt, he cannot plead in abatement, and also in bar to the other counts. But whether, if these inconsistent demands appear in the account rendered to him by the plaintiff, he can demur to a declaration correct on the face of it, may be a question. If he cannot, the defendant ought, in some way or other, to be protected against the necessity of meeting such inconsistent demands at the trial.

*Peters, Justice*, was of opinion, that the account might be admitted; and the Court being divided, the account went to the jury, to which the defendant's counsel took an exception.

(The defendant then offered as an offset, a receipt by Charles Wilkins, of a certain sum of money, which Charles had paid to the plaintiff, on account of the defendant; having first proved, that this sum was paid by Charles Wilkins to the plaintiff. *By the Court*. This receipt is offered as evidence that the money paid by Charles Wilkins to the plaintiff, was paid for the account of the defendant. This would have been better proved by Charles Wilkins himself, who is alive, and might have been examined. The receipt, therefore, cannot be given in evidence.)

The defendant then offered an account of money paid to the plaintiff, by John and Charles Wilkins, which was objected to.

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*By the Court.* This was said, by the defendant's counsel, to be precisely like the case which has, by a division of the Court, been decided against the defendant. That since the plaintiff has been permitted to give in evidence a demand against John and Charles Wilkins, John, the defendant, ought to be at liberty to offset demands of John and Charles Wilkins against him. This has the appearance of fairness, particularly, as Charles will have to contribute to any judgment which may be recovered against John, for a debt of John and Charles. But still it is inconsistent with legal principles, for the defendant to offset a debt, which is due not to him alone, but to him and another. Were it to be allowed, the admission of it as an offset, would be no bar, in an action to be brought by John and Charles against the plaintiff; although one partner is bound singly, to pay the whole of a partnership debt, unless he compels the plaintiff, by a proper plea, to join his partner with him, yet he is not entitled to the whole of a debt due to the partnership; and if he sue singly for a partnership debt, he may be defeated at the trial on the general issue, for he knew who were his partners.

In summing up, it was contended, by the defendant, that the articles of the 15th December 1803, constituted a partnership; that they were to share in loss in effect, since there can be no profit, but what remains after the losses are deducted; and that at all events, the advertisement at Natchez, was sufficient to bind them, as partners, to third persons. If so, then the defendant may be made liable for all the debts contracted by the plaintiff or his other partners; and it would be unreasonable for the plaintiff to recover even a separate demand, much less, those demands which were on partnership account, until the partnership accounts are settled, and a balance struck. As to the articles of dissolution, this is not binding on third persons; and the plaintiff, if he would avail himself of it, should have brought his action on this agreement, it being under seal. Case cited, 4 T. Rep. 670.

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*WASHINGTON, Justice*, charged the jury. To decide this cause correctly, it is necessary for the jury to have a very distinct conception of the nature of the connexion formed between the parties to the agreement of the 15th December 1803. Each party was to carry on trade upon his own capital, credit, and responsibility. Neither was to be answerable in any manner, for the engagements of the others, nor were the whole to be answerable for the engagements of any one. There was to be a participation of profits, but not of losses. Thus, if the plaintiff had, on the business separately carried on by him, sustained a loss of 5000 dollars, and the defendant, on his separate business, had made a profit of 10,000 dollars, upon the principle of co-partnership, the loss of the plaintiff would be borne by the profit fund of the defendant, and not be left singly on the shoulders of the plaintiff; and only the remainder, viz. 5000 dollars, would be divided. But in this case, the plaintiff would have to bear the whole loss of the 5000 dollars, and would share with the other members of this association, in the 10,000 dollars made by the defendant. Purchases made by one of these parties, or moneys borrowed, either from another of the parties, or from a stranger, to enable him to carry on his separate store, was a private debt between those persons; as much so as if they never had formed a connexion of any kind. This was most unquestionably the case, as between the parties to that contract; and it could never be allowed to one of the parties, to repel the claim of another, who, by money lent or goods sold, had become his creditor, by saying it was a partnership debt, in the face of their agreement, which declared, that each party was to be severally bound for his own engagements. Indeed, we are not prepared to admit, that a stranger, who had dealt with one of these parties, with full knowledge of the articles, and of the true nature of the connexion between them, could charge the other partners. The advertisement published at Natchez, might possibly produce this effect; but as to that, we give no opinion, otherwise than by saying, that if it would

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bind all the parties for the engagements of one, to third persons, it would have no such effect, as between the parties themselves; who, notwithstanding any thing stated in that notice, knew very well the real nature of their connexion. If any possible doubt could exist, upon the articles of the 15th December 1803, there can be none under those of the 19th September 1804, which even destroys the community of profit, as to the business carried on separately by the parties, and contains an express stipulation, that each party shall be responsible for his own engagements. This, to be sure, would not affect the rights of third persons; but we hold it conclusive between these parties. The word copartnership, mentioned once or twice in this agreement, is of no consequence; it cannot alter the nature of things, and constitute a partnership, where, from the essence of the connexion, there was none. This paper not being the foundation of the plaintiff's action, may well be resorted to, to explain the nature of the connexion between these parties.

It is said, that it is hard to charge the defendant with the separate demands of the plaintiff, and yet leave him exposed to the claims of strangers, who have sued, and may yet sue him, as a copartner, for the debts contracted by the plaintiff. This is true, but it is not in this action that the defendant can be relieved.

Although in the store transactions of these parties, they acted separately, and not as partners, yet, by the express terms of the agreement of the 19th September 1804, they all agreed to share in profit and loss, as to purchases made at Natchez, by Steitz. Of course, should it appear to the jury, that any of the items in the plaintiff's account, arise on these transactions of Steitz, as, for example, if any of the bills drawn on the plaintiff, and now charged by him to the defendant, were drawn to enable Steitz to make the purchases, in the profit and loss of which all the parties were to participate, the jury will exclude such items from the plaintiff's account.

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Schwartz vs. The Insurance Company of North America.

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**F. & A. SCHWARTZ, SURVIVORS OF WILLIAM M'FADON vs.  
THE INSURANCE COMPANY OF NORTH AMERICA.**

Insurance. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and conduct; that the property shall belong to neutrals; that it shall be so documented as to prove its neutrality, and that no act of the insured or his agents shall be done, which can legally compromise its neutrality.

The laws of nations do not prohibit the carrying of enemies' goods in neutral vessels; so far from so doing, upon the condemnation of the goods, the vessel is entitled to freight.

But, if a neutral endeavours by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavours to protect; and the increase of risk, by being carried in for adjudication, is produced not by a legal act, but by a fraud on the neutrality of his own government, and upon the rights of the belligerent.

The warranty of neutrality is broken, by unneutral conduct in the insured.

It is enough to produce a forfeiture of the indemnity of the insurance, if the risk is varied or increased, by conduct inconsistent with the duties of neutrality.

**POLICY** on the ship *Margaret*, at and from Batavia to Baltimore, dated January 19th 1807; valued at 25,000 dollars, of which 20,000 dollars were underwritten—warranted American property, proof to be made at Baltimore only. The order for insurance mentioned, that the outward cargo of this vessel had consisted of goods contraband of war.

The facts, as appeared by the evidence, were, that this ship sailed with a cargo of contraband, in 1804, commanded by William M'Fadon, the part owner, and stopped at the Cape of Good Hope, where she sold part of her cargo; thence she proceeded to the Isle of France, where she sold the balance, on credit, to

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the government. In November, she sailed for Batavia, with 12,000 dollars in specie, the greatest part of which was the proceeds of this outward cargo. There not being at Batavia produce sufficient to load her, M'Fadon chartered her to a Mr. Arnold, a Dutch merchant of that place, on a voyage to Tranquebar, and there left her under the command of one Deshon, the mate, and in case of any accident to him, Herd was to command her; he, M'Fadon, returning to the United States in another vessel. By the illness or death of Deshon, the command devolved on Herd, who made the voyage to Tranquebar, and back to Batavia, as well as a second voyage to the same place, and on account of the same person.

In consequence of the ship requiring twice to be repaired, Herd was compelled to expend considerable sums on that account; and not having funds sufficient for this purpose, and to procure her load, he entered into a written agreement with Arnold, (who wished to come to the United States with his family and property,) to the following effect. The ship was to be loaded with coffee, sugar, &c., the produce of the island, on account of Arnold and the plaintiffs, to be consigned to the plaintiffs, who were to sell the same without charging commissions, and the proceeds to be paid one-half to Arnold. Arnold to pay a stipulated sum for the freight of his part of the cargo, and the transportation of himself and family; and also, to advance to Herd, what money he might want to pay for his half of the cargo. In order to neutralize the property, Herd was, in addition to the real bills to be drawn on his owners for their part of the cargo, to draw bills to the amount of 30,000 dollars on his owners, in favour of Arnold, which, however, they were not expected to pay. For the security of Arnold, Herd, by the same contract, agreed to hypothecate the vessel, cargo, and policies of insurance. The bill of lading, invoice, and other papers, stated the cargo to belong to the plaintiffs, citizens of the United States.

In March 1807, she sailed from Batavia—Arnold died on the



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voyage. She was afterwards brought to by a British cruiser, the captain of which, after inspecting such of her papers as were shown by captain Herd, was induced, in consequence of suspicions excited by some of the sailors of the *Margaret*, to examine the trunks belonging to Arnold. Here they found the above agreement, as well as property of great value, in precious stones. The vessel and cargo were taken into Barbadoes, and condemned as enemy's property; the captain claimed the ship and half the cargo for the plaintiffs. On notice of the capture, the plaintiffs offered to abandon, which was refused. The order for insurance, stating the nature of the outward cargo, was communicated to the defendants.

The objections made to the plaintiffs' recovery were—1. That the plaintiffs have not proved themselves to be citizens of the United States, as the certificate of naturalization of the plaintiff, Augustus Schwartz, mentions Augustus Jacob. The evidence, however, very clearly proved, that they were, in fact, the same person, the additional name of Jacob being dropped in the firm of the house.

2. A deficiency in the proof, that the vessel was the property of the plaintiffs. All her papers being lodged in the admiralty, at Barbadoes, and the defendants not consenting to read the record, the evidence to prove property, consisted principally of acts of ownership exercised by the plaintiffs, and the letters of Herd to them as owners. To prove such evidence as this sufficient, the plaintiffs read *5 Espinass. 88.*

3. Concealment of the circumstance, that this vessel had been engaged in carrying on the trade of belligerents, from one of their colonies, which was considered by the Court of Admiralty, as an adoption of her by belligerents, and which at all events, increased the risk of seizure and carrying in. *1 Rob. 10. 5 Idem, 327.*

4. That the hypothecation of the vessel and cargo, amounted to a transfer to an enemy, so far as to vest an interest in him to the extent of his security, which, by the capture, became vest-

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ed in his enemy, and consequently, amounted to a breach of the warranty. 2 Caines' New-York T. R. 72.

5. That the hypothecation of the policies, transferred them to the obligee, so as to deprive the plaintiffs of the right of recovery on them. 2 Caines, 110.

6. The covering of the property of the belligerent, is a breach of the warranty. 1 Marsh. 410. 406. 473. 2 Dall. 34.

*WASHINGTON, Justice*, charged the jury. The Court, considering the last objection as fatal to the plaintiffs' recovery, the others will be passed over without observation. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and in conduct. That is to say, that the property belongs to neutrals; that it shall be so documented as to prove its neutrality; and that no act of the insured or his agents shall be done, which can legally compromise its neutrality. If, for the want of papers required by the law of nations or treaties, or if by unneutral conduct, a loss ensues, or even an impediment occurs which varies or increases the risk, although a loss is not the consequence; the warranty is not complied with. This is clearly the doctrine established by the case of *Rich vs. Parker*, 1 Marsh. 409. The want of the passport required by the treaty between the United States and France, did not justify a condemnation, if, in fact, the vessel was American; but it justified a seizure and carrying in for examination; whereas the passport, had it been on board, would, by the treaty, have been so conclusive, that it would have been the duty of the French cruiser, to have suffered the vessel to proceed. The want of this paper, therefore, was considered a breach of the warranty; since it authorized the carrying the neutral out of his course, and an interruption of his voyage, which is an increase of risk, from which the insurers were by the warranty to be relieved.

In this case, it is argued, on behalf of the insured, that the circumstance of having belligerent property on board, was no

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breach of the warranty of the neutrality of the vessel. This is very true; because the law of nations does not prohibit the carrying of enemy's goods in neutral vessels; so far from it, that upon the condemnation of the goods, the vessel is entitled to freight. But, if the neutral endeavours by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent, whom he thus endeavours to protect; and the increase of risk, by being carried in for adjudication, is produced, not by a legal act, as in the former case, but by a fraud on the neutrality of his own government, and upon the rights of the belligerent. The warranty of neutrality is broken, by unneutral conduct in the insured. We do not mean to countenance the idea, that such conduct would justify the Court of the belligerent in condemning the vessel, for the taint on the cargo, or even the whole of the cargo, because of a part, which can be distinguished from the residue, being covered.

It is true, that in case of contraband, covered by a false destination, the British Courts of Admiralty condemn the vessel on account of the fraud, which seems to carry the punishment very far indeed. But it is enough to produce a forfeiture of the indemnity, if the risk is varied or increased by conduct inconsistent with the duties of neutrality. Upon the whole, there being no doubt as to the facts in this case, the law is clearly in favour of the defendants on this point.

*The plaintiffs suffered a nonsuit.*

**BRADFORD vs. BOUDINOT.**

In equity. Defendant obtained letters testamentary from the Register's office in Philadelphia, to a supposed will of W. B., which, on an issue, was determined not to be the will of W. B. In relation to another supposed will, the same determination took place, and letters of administration to the estate of W. B., were then granted to the plaintiff. While the controversy as to the first supposed will was pending, the defendant took possession of the estate of W. B., and went on to administer the same, until the appointment of an administrator *pendente lite*, to whom the defendant delivered all the effects of W. B.

The defendant having received letters testamentary on a will duly proved, was authorized to perform every act proper for an executor to do, notwithstanding the pendency of the question relative to the validity of the will.

The defendant was authorized, and it was his duty, (believing the paper to be the last will of W. B.) to support the first probate; and he is entitled to retain out of the estate, the expenses he was put to in that litigation; as also, the usual commissions for managing the estate while in his hands. There is no ground for considering the defendant an executor *de son tort*, in this case.

**BILL** in equity, for an account of the personal estate of William Bradford, which had come to the hands of the defendant. The case was, that upon the death of William Bradford, a will was found, in all respects regular, in which the defendant was appointed the executor. He accordingly proved the same in the Register's office, and obtained letters testamentary, and possessing himself of the estate of the testator, proceeded to pay and receive debts, and in all respects to discharge the duties of an executor. Not long after the probate, the plaintiff obtained a caveat, (as the bill states;) and the Register's Court directed a feigned issue to the Court of Common Pleas, to try whether this was the will of William Bradford. This ques-

## Bradford vs. Boudinot.

tion was finally decided, in the Supreme Court, not to be the will of said Bradford. A second will was then offered for proof by the executor named in it, which was finally decided not to be the last will; and administration was granted to the plaintiff. During the contest respecting the second will, an administrator *pendente lite* was appointed, to receive the estate and take care of it, to whom the defendant delivered over all the property, not administered.

The cause now came on, upon exceptions to the commissioners report, made under an order of this Court. The exceptions were as follow,—1. To the allowance made for funeral expenses. The whole amounts to about 500 dollars, and includes the expenses of the widow during the funeral.

2. To other small sums, amounting in all to 215 dollars, having been expended by the defendant for fees, costs, and expenses, in the contest respecting the first will, on which he had obtained letters testamentary. It was contended, that the defendant was to be considered, after the repeal, as an executor *de son tort*, entitled to credit only for debts paid. Godolp. 50. Burn's Ecc. Law, 610.

3. Exception to the allowance of commissions.

The other exceptions, the parties agreed to arrange.

WASHINGTON, Justice, delivered the opinion of the Court. The defendant, having received letters testamentary upon a will regularly proved before a competent tribunal, was authorized to perform all those acts, which an executor has the general power to perform, notwithstanding the pendency of a litigation respecting the validity of the will. The 18th section of the Act\* of this state of the 13th of April 1791, sanctions all his

\* The Act is, "that no appeal from the Register's Court, concerning the validity of a will, or right to administer, shall stay the proceedings, or prejudice the acts of an executor or administrator pending the same, if the executor shall give sufficient security for the faithful execution of the will."

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acts pending the contest, unless where an administrator *ad-hoc* is appointed; which, upon the refusal of the executor, to give security for the faithful execution of the will, the Register is authorized to appoint. No such appointment was made in this case, nor does it appear that the defendant refused to give such security.

The defendant was not only authorized, but it was his duty, believing the first will to be the real last will and testament of William Bradford, (which he asserts in his answer he did,) to support the decision of the Register in favour of that will; and he was entitled to the aid of the estate, to discharge all reasonable costs and expenses incurred on that account. Upon the same reason, he is entitled to the compensation usually allowed to an executor, for his pains and trouble in the management of the estate, whilst it remained in his hands. The allowance made by the commissioner for funeral expenses, is by no means deemed unreasonable. This is not a question, which in any respect affects creditors; and the whole sum allowed is but a trifle, when taken from the large amount of personal estate which is to be distributed. The exceptions, therefore, are overruled; it being understood that the parties have agreed to settle, amicably, the subjects included under the fourth and fifth exceptions.

but in case of refusal, the Register is directed to appoint an administrator during the dispute, which shall suspend the power of the executor during that time.

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Cropper vs. Nelson.

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**CROPPER vs. NELSON.**

In an action on a bill of exchange, brought by the endorsee of the second endorser, against the payee, who had endorsed the bill to the plaintiff; the plaintiff's endorser cannot be a witness to prove that the bill belongs to him.

Exchange is to be settled at the rate prevailing at the time of the verdict.

**ACTION** on a bill against the payee, who endorsed it to one B., in blank, who endorsed it in full to the plaintiff. The defendant offered B., to prove that he is the real owner of this bill, in order to show a want of jurisdiction in the Court; B. being a citizen of this state.

*By the Court.* The witness cannot be admitted to swear himself into an interest. It would be a great temptation to perjury to admit him.

The Court directed the jury to settle the exchange, (this being a sterling bill,) as of this day, which is from 18 to 20 per cent. below par.

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Turner vs. Waddington.

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## TURNER vs. WADDINGTON.

Upon the plea of *quid tunc record* to debt, on a judgment in another state, the seal of the Court must be annexed to the record itself; and it is not sufficient, that it is annexed to the certificate of the judge of the Court, authenticating the attestation of the clerk who certifies the record.

**DEBT** on a judgment recovered in a Court in the state of Massachusetts; plea, no such record. The record produced, has only the attestation of the clerk, without the seal of the Court annexed. But annexed to the record, is the certificate of the judge of the Court, with the seal of the Court attached to it, stating that the attestation of the clerk is in due form. This was objected to.

*By the Court.* The seal ought to have been annexed to the record, of which the certificate of the judge is no part.

*Juror withdrawn by consent.*



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 Smith et al. vs. The Delaware Insurance Company.
 

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**SMITH & BUCHANAN vs. THE DELAWARE INSURANCE COMPANY.**

**Insurance.** Action on a policy, on goods on board the *Julius Henry*, at and from Baltimore to Hamburg, with leave to touch at Tonningen, warranted free from loss, charge, or damage, in consequence of seizure or detention for, or on account of, illicit or prohibited trade.

What will be considered a delay of an abandonment, so as to affect the right to recover from the assurers.

Where a seizure is made within the territories of a foreign government, on account of illicit trade, it cannot be said the warranty is not broken, because the seizure was not made before the vessel arrived at her port of destination, or before she had an opportunity to do some act amounting to an actual trading.

In a case of a warranty of *neutrality* only, the parties have a view to the laws of nations, and subsisting treaties; and the insured only engages that the property is neutral, for the purpose of being protected; and in fulfilling this engagement, the insured can never be surprised by the want of all proper documents, except by his own neglect or fault.

A warrant against *illicit or prohibited trade*, has a view to the municipal laws and ordinances of the country, where the trade is to be carried on; and foreigners going there, are bound to know and to observe those laws. The warranty amounts to a stipulation, that the trade in which the insured shall engage, shall be lawful to the purpose of protecting the property insured, and that it shall not become unlawful by the misconduct or neglect of the insured.

**ACTION** on a policy, dated 22d of August 1807, on goods on board the *Julius Henry*, at and from Baltimore to Hamburg, with leave to touch at Tonningen; valued at 10,000 dollars; warranted free from any charge, damage, or loss, which may arise in consequence of seizure or detention for, or on account of, illicit or prohibited trade.

The facts of the case are substantially as follow. This vessel, belonging to the plaintiffs, sailed with a cargo, also the pro-

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Smith et al. vs. The Delaware Insurance Company.

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perty of the plaintiffs, from Baltimore, about the 22d of August 1807, with a letter of instructions to the master, to go to Tonningen, or to Hamburg, if the Elbe should not be blockaded; and upon his arrival at Tonningen, to write to Van Hollen, the agent of the plaintiffs, and consignee of the cargo, at Hamburg, (whose orders the captain was to follow,) informing him of his arrival. The bill of lading, invoice, and outward manifest, all speak of Tonningen as the port of destination. The vessel having proceeded as far as Heligoland, was there warned by a British vessel of war not to go to Tonningen, as the Eyder was blockaded; in consequence of which, he sailed for Hamburg, and arrived at Cuxhaven about the 22d of October, where the vessel was seized, the papers examined by the custom-house officers at that place; and a French officer and other persons were put on board, who proceeded with her to Hamburg, where her cargo was landed, under the orders of the principal officer of the customs at that place; and a part of it was then sent off to France, in wagons, and the residue was sold at Hamburg. Hamburg, as well as Cuxhaven, was then in the possession of the French government, and all the transactions in relation to this vessel and her cargo, were conducted by persons representing the Emperor. The cause alleged for the seizure, and also for the condemnation of the vessel and cargo, (which soon followed, and which was afterwards confirmed by the Emperor,) was the not having on board a certificate of the origin of the cargo, as required by the French decree of the 6th of August 1807. The third article of this decree declares, "that colonial goods shall not be admitted, but when accompanied with certificates of origin; by our commissary of commercial relations residing at the ports of embarkation, although they did not proceed from England or her colonies."

It appears, by the correspondence between Van Hollen and the plaintiffs, that notice was given by the former to the latter, so early as the 11th of September 1807, of the seizure, and the

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cause of it; and by other letters dated early in November, it was stated, by the agent, that he should put in a claim at Paris. In December, the agent's letters informed the plaintiffs, that the American minister at Paris could do nothing for the relief of the property, and he expresses himself very despairingly as to the release of it. But by a letter dated the 15th of January 1808, the agent expresses some hope of success, from a petition which he had presented, in which case, he adds, that the adventure may turn out very advantageous to the plaintiffs, in consequence of the high price of the articles composing this cargo. These letters, and many others, were received by the plaintiffs, from the 21st of December 1807, to the 2d of May 1808; and on the 9th of June following, the offer to abandon was made, and after some time refused. The plaintiffs, in one of their letters to Van Hollen, dated the 17th of April 1807, expressed their hope that the cargo would be released, and that the seizure might ultimately turn out to their advantage.

Upon this evidence, the Court left it to the jury to say, whether the abandonment was made in due time; expressing, at the same time, a strong opinion that it was not, and that it was delayed, with a view to take the chance of an acquittal, and to speculate upon the high market for these goods. The jury were directed, in case they should be of opinion that the abandonment was not made in time, to find for the defendants, subject to the opinion of the Court upon the points of law arising in the cause; the defendants agreeing, that judgment should be entered for the plaintiffs, for the sum ascertained by the parties, in case the law should be decided against them.

The jury having found for the defendants, under the charge of the Court, and consequently, that the abandonment was not made in due time; the questions of law arising in the cause, and reserved for the opinion of the Court, are—1. Whether the plaintiffs are entitled to recover any thing in this action, the loss having become total?—and secondly, Whether the war-

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ranty against loss, on account of seizure or detention for illicit or prohibited trade, has been complied with?

*WASHINGTON, Justice.* The opinion of the Court will be confined to the second question. It is contended by the counsel for the plaintiffs, that this warranty extends only to illicit trading, by sale, barter, or otherwise, which did not take place in this case, inasmuch as the vessel entered the Elbe, not with a view to trade, but from necessity, in consequence of the blockade, which prevented her from going to Tonningen; and that she was seized before she had broke bulk, or done any act which amounted to a trading. That in fact, the trade she contemplated was not illicit or prohibited, because the cargo had not come from a British colony, and consequently, did not come within any of the French decrees, in force at the time of the seizure. That the decree of the 6th of August, merely required a certain document to accompany the cargo, which it was impossible the plaintiffs could have complied with, the decree not having been known, nor could it have been known in the United States, at the time the vessel sailed; and finally, that the law can never be so unjust as to punish any person for omitting to perform an impossibility.

First, it is said, that this vessel went to Cuxhaven from necessity, and that she did not trade previous to the seizure. If the first branch of this argument were true, it would be at once destructive to the plaintiffs' right of recovery. For, if the destination of this vessel was to Tonningen, and not to Hamburg, there never was an inception of the voyage insured, which was to Hamburg, with leave to touch at Tonningen; and consequently, the policy never attached. It is true, that the bill of lading, and outward manifest, are for Tonningen, and even the letter of instructions, seemed to warrant the ending of the voyage at that place. But, as no objection on this ground was made at the trial by the counsel for the defendants, it is fair to suppose, that the defendants were satisfied that the termini of

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the voyage were, in reality, such as are mentioned in the policy. If so, it will be difficult to maintain the ground taken by the plaintiffs' counsel, that where a seizure is made within the territories of a foreign government, on account of illicit trade, the warranty is not broken, because it was made before the vessel had arrived at the port of her destination, or had an opportunity to do some act amounting to an actual trading. Where the policy is on the outward cargo, as in this case, it can seldom, if ever, fairly happen, that the seizure should not precede such a trading; since the illegality of the contemplated trade must be discovered, before the unlading or breaking bulk would be permitted. It is true, that in such a case, if it appear that there has been no *mala fides*, but that the neutral has acted under an entire ignorance of the municipal law of the country, where he intended to trade, humanity would seem to forbid a just nation, from proceeding further than to turn him away; yet, if a more rigid conduct is adopted, or if an intended breach of the law be proved or suspected, and the property is seized and condemned, justly or unjustly, but avowedly for a breach of such law, it is impossible for a reasonable doubt to exist, that the loss has not happened on account of a prohibited trade. A different construction would render this warranty, so hazardous to the insured, of very little consequence to him, and a mere nullity in respect to the insurers.

Secondly. It is said, that this trade was not prohibited, and that the condemnation proceeded upon the ground of the want of a document to prove the origin of the cargo. In order to test the strength of this argument, let it be supposed, that the decree of the 6th of August had been known in the United States, before this vessel sailed. Would it, in that case, be contended, that the want of the document required by this decree, would not have amounted to a breach of the warranty? And if it would, it proves, that without the document, the trade was illicit and prohibited. But we understand the decree to amount to this—that articles, the produce of the colo-

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nies of Great Britain, are prohibited from being brought, upon any terms, into any place possessed by the French; and the produce of any other country is prohibited, which is not accompanied by a certificate of origin, no matter how conclusive the proof may be, that it was not the growth of a British colony. In either case, the trade is prohibited altogether, whether the decree, containing the prohibition, were known to the neutral or not. If, then, the knowledge or ignorance of the neutral, in respect to the decree, makes no difference in regard to the illegality of the trade, the whole question comes to the hardship and injustice to which the merchant is made the victim, as to which, there can be but one opinion. But who is to be the sufferer in such a case? The insured, who consented to exempt the insurer from all loss which might happen on account of illicit trade; or the insurer, who, in estimating the premium for the risk he undertakes, has allowed to the insured, what both parties supposed to be the value of this exemption? Most undoubtedly the former. In the case of a warranty of neutrality, the parties have a view of the law of nations and subsisting treaties; and the engagement of the insured is, that the property is neutral to the purpose of being protected. It must of course be neutral, in fact, in appearance, and in conduct. In fulfilling this engagement, the insured can never be surprised by the want of all necessary documents, unless by his own neglect. But, the warranty in this policy has a view to the municipal laws and ordinances of the country, with which the trade is intended to be carried on, which the subjects or citizens of foreign countries are bound to observe, whether previously made known to them or not. Ignorance of such laws, will be no excuse for a breach of them; and an engagement with a third person not to violate such laws, cannot be satisfied by a plea, which would be ineffectual in the country where the law was broken, and the penalty incurred. The warranty against illicit trade, amounts, in short, to a stipulation that the trade, in which the insured engages, shall be lawful to

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the purpose of being protected :—that is, that it shall not only be lawful in fact, but that it shall not become otherwise by the misconduct of the insured, or from the want of all necessary documents required by the laws of the country to legitimate it. For, what would it signify to the insurer, whether the loss arose from the circumstance that the trade was prohibited altogether, or was prohibited unless accompanied by certain documents?

That the seizure and condemnation of property, because it was unaccompanied by papers which the insured could not possibly know were required, is to the highest degree unjust, has already been admitted. But is this more unjust, or does it impose a greater hardship on the insured, than if a trade known to be lawful when the voyage was commenced, should be prohibited but the day before the arrival of the vessel, and on this recent order or law, she should be seized and condemned? And yet it can scarcely be doubted by any one, but that in such a case, the warranty would protect the insurer.

The truth is, that the insured, by such a warranty, takes upon himself every risk which can occur in consequence of the trade being prohibited, whether absolutely, or under any qualification, and whether known or unknown to him; and for an engagement attended with so much danger, especially during the present European war, he is entitled, and no doubt takes care, to indemnify himself, by a proper diminution of the premium.

## AZCARATI vs. FITZSIMMONS.

Motion to take out of Court money levied by the marshal, to satisfy a judgment obtained by the plaintiff against the defendant, on the ground of priority, under a judgment obtained in the Court of the state of Pennsylvania, in favour of William Lewis Esqr. who made the motion.

Although the remedy by motion, to take money out of Court, in a case of this kind, is not the only one the party has, yet, as it decides the rights of the parties in a summary way, it is convenient to all; but the Court will take care, that the party who shall be authorized to take the money, is entitled to it, under a regular execution, and under which the proceedings have been regular. If irregularities appear, sufficient to set aside the execution, the party must resort to his suit at law against the officer. It is a fatal objection to an execution, that it issued more than a year and a day after the judgment, without a *scire facias* having been issued to revive the judgment.

It seems, that the Court would not be disposed to aid the plaintiff, in an execution which had been dormant for a considerable time, to the disadvantage of a party having equal equity, although he had been equally negligent.

**WILLIAM LEWIS**, executor of Fuller, on the 20th of March 1800, revived a judgment by *scire facias*, which had been obtained by Fuller. A *Fieri facias* issued, returnable to December 1800; an *alias fieri facias*, returnable to December 1801, on which proceedings were stayed by order of Lewis. A *Plur. fieri facias* returnable to March 1802, on which proceedings were likewise stayed. A second *Plur. fieri facias* was then issued to December 1804, on which a return of *nulla bona* was made, and on the 9th of September 1811, a third *Plur. fieri facias* was issued, to December, which was levied on the 12th of September 1811, on property in the hands of the marshal of this Court, which he had seized prior to the date of this execution, under



Azcarati vs. Fitzsimmons.

his Court, obtained by Azcarati. The *en*  
the *fieri facias*, returnable to December  
*next breve*.

and the property seized, in order to  
n, and brought the money into  
the part of Mr. Lewis, to take  
in the state Court, on the  
plaintiff's right, it appeared  
he issued on his judg-  
ed on real property,  
issued in 1804. By  
that he levied this writ on the  
defendant, as per inventory taken,  
were stayed by order of plaintiff's attorney.  
was examined, and he stated, that having seized  
culture and made an inventory of it, on a former execu-  
tion of one Verdere, which was partly settled, he levied the  
plaintiff's *fieri facias* on the same furniture, and an additional  
quantity; that he left the property with the defendant, taking  
an indemnity against subsequent executions; but that soon af-  
ter the death of Fitzsimmons, in August last, he seized the pro-  
perty again, and retained possession till the sale, which seizure  
or repossession was gained, prior to the 9th of September, when  
Lewis's execution issued.

It was contended, by Tilghman and Rawle, for Lewis, that  
the furniture under Azcarati's *fieri facias*, was not seized, as  
appears by the only legal evidence, the return of the writ, and the  
marshal's docket, and that it could not be seized under the *ven-*  
*ditioni exponas*. But at all events, the leaving the property  
with the defendant, did away the force of the seizure, as de-  
cided often in this Court.

That the proceedings of Lewis are regular, as an execution  
was taken out within a year after the judgment; and that the con-  
tinuances, though not actually entered on the roll, may be con-  
sidered as if done. *Str.* 100. 2 *Burns*, 172.

Levy, for the plaintiff, contended, that Lewis's execution was irregular, as the continuances of his first execution cannot be entered, unless the first execution was returned and filed. 2 Wils. 82. 2 Tidd's Prac. 1004. 2 Sand. 72 *f.* 68 *e.*

*WASHINGTON, Justice*, delivered the opinion of the Court. The first question is, whether Mr. Lewis, in whose behalf this motion is made, is entitled to the money returned by the marshal, as levied, in satisfaction of the plaintiff's execution? If he would have been entitled, in case his right had accrued upon a judgment of this Court, his case will not be different because his judgment was obtained in a state Court.

This is not the only remedy which a party has, to redress himself against an officer who applies to the satisfaction of some other judgment, the proceeds of property which is bound by the execution of such party. But the practice of deciding upon motion, the priorities and rights of contending parties, for money raised by the officer upon execution, and brought into Court, contributes to the convenience of those parties, and to the safety of the officer. It saves expense, and prevents multiplicity of suits.

Nevertheless, the Court will take care, that the person who is authorized to take out the money, is entitled to the same, under a regular execution, and that the proceedings under it have been regular. If such irregularity appears, as in the opinion of the Court is sufficient to set aside the execution; the Court will not interfere in a summary way, in favour of the party, but will leave him to his other remedies, and will leave the officer to act in such manner as he may think most safe. For, it would be not less absurd than mischievous, to permit a person to take money out of Court, under the authority of an execution, which, the Court from which it issued may, and ought, to set aside for irregularity.

The question then is, whether the execution, under which Mr. Lewis claims, has been regularly issued? The objection

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Azcarati vs. Fitzsimmons.

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that it issued more than a year and a day after the judgment, without a *scire facias* to warrant it, seems to the Court fatal. It is true, that if the first execution, which was taken out within the year and day, returnable to December 1800, had been regularly continued down to the period when this execution issued; or if that execution had been returned and filed, so that the continuances could be considered as entered; this objection might be removed. And yet, even in that case, there might be considerations sufficiently weighty with the Court, to forbid them from supplying the want of regular continuances in favour of an ancient, dormant, execution, to the disadvantage of other creditors having equal equity, although they may have been equally faulty. But it is unnecessary, in this case, to consider the comparative merits of the contending parties for this money, since the Court is of opinion, that the irregularity of the proceedings of the present applicant, is fatal to his pretensions.

## CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1812.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
          { Supreme Court.  
          { Hon. RICHARD PETERS, District Judge.

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### POPLESTON vs. KITCHEN.

The assured is not bound to communicate the age of the vessel, or where she was built, unless required so to do. It is enough, if he is prepared to vindicate his implied warranty, as to the seaworthiness of the vessel, in case it is questioned.

**ACTIONS**, on two policies, on vessel and cargo. The defence was—1. That the vessel was built in New-England, and thirteen years of age, which circumstances were not communicated to the underwriters; and 2. That the plaintiff had not shown that the vessel was sufficiently found and manned, although the jury should be satisfied that the body of the vessel was seaworthy for the voyage.

*WASHINGTON, Justice*, stated, that the plaintiff was not bound to communicate the age of the vessel, or where built, unless they had been asked of him. It is enough, if he is prepared to vindicate his implied warranty, as to the seaworthiness of the vessel, in case it be questioned. The Court left it to the jury to say, whether, upon the evidence, she was seaworthy at the

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Popleston vs. Kitchen.

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time the voyage commenced, there being very slight evidence, if any, to the contrary.

*Verdict for plaintiff.*

**NOTE.** Seaworthiness, which includes being sufficiently found and manned, is to be presumed; it is an implied warranty, which must be established, if impeached, but not otherwise. *Condy's Marshal*, 159. 165 *a. n. 16.*

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**Savary vs. Goz.**

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**SAVARY vs. GOZ.**

Debt on bond, conditioned to deliver to the plaintiff or his agent, in B., a quantity of whiskey, in all the month of May 1809. Plea, that in all the month of May 1809, the defendant was ready and willing to deliver to the plaintiff or to his agent, at the place of embarkation in B., the whiskey, according to the condition of the bond; but the plaintiff, or his agent, was not then and there ready to accept the same.

The rule of law is, that if the condition of the bond is not parcel of the obligation, as if the latter be a money penalty, and the former be to do some act, as to deliver goods. &c., it is not necessary for the defendant to plead *uncore prest*.

If money is to be paid, or any other act to be done, on a certain day, and at a certain place, the legal time of performance is, the last convenient hour of the day for transacting business. But if the parties meet at any part of the day, a tender and refusal at the time of the meeting are sufficient.

The rules of pleading require, that the plea should be direct in stating with sufficient precision the matter of defence, and not leave it to be found out by inference, however strong.

The plea, in this case, is bad, as it does not state that the defendant was at the place of embarkation, in person or by an agent, ready and prepared to deliver the whiskey.

**T**HIS was an action of debt on a bond, in the penalty of 1920 dollars, with condition, that the defendant should deliver to the plaintiff, or his agent or assigns, at the place of embarkation in Brownsville; the quantity of 1920 gallons of good merchantable proof whiskey, in good and tight barrels, in all the month of May 1809. Upon oyer of the obligation and condition, the defendant pleads in bar, that in all the month of May 1809, he was ready, and prepared, and willing, to deliver to the plaintiff, or to his agent or assigns, at the place of embarkation at Brownsville, the quantity of 1920 gallons of good merchantable proof

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Savary vs. Goe.

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whiskey, in good and tight barrels, according to the tenor and effect of the said condition; but the plaintiff was not then and there ready to accept the same, nor was any agent or assignee of the plaintiff then and there ready to accept the same. There are four other pleas to the declaration; but as they, as well as the one just stated, are all demurred to specially, and the objections made to the first are also directed to the others, they need not be specially set forth.

*WASHINGTON, Justice*, delivered the opinion of the Court. It is objected to this, and the other pleas—1. That it does not state that the defendant is still ready to deliver the whiskey in the condition mentioned. 2. That it does not allege the readiness and preparation of the defendant, *at the last convenient hour of the 31st of May*. 3. It does not state that the defendant was at the place of embarkation, in person or by an agent, ready and prepared to deliver.

The first objection was pressed, not so much upon the authority of adjudged cases, as upon the unreasonableness of the doctrine to which it is made, which renders a tender and refusal, or a readiness to perform, and the want of it in the other party, tantamount to performance, so as for ever to discharge the obligation. The rule of law was, indeed, admitted to be, and so it undoubtedly is, that if the condition of the bond be not parcel of the obligation, as if it be to deliver certain goods, the obligation being for money, it is not necessary for the defendant to plead *antore fret*; and if the legal consequence of tender and refusal, in such a case, be a discharge from the obligation, it belongs not to this tribunal, on that account, to depart from the established doctrines of law. This objection, therefore, has no validity.

The doctrine laid down by the plaintiff's counsel, upon which his second objection is founded, can by no means be questioned. It is clear, that if money is to be paid, or any other act to be performed, on a certain day and at a certain place, the legal

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Savary vs. Goe.

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time of performance is the last convenient hour of the day for transacting the business. . This rule is established for the convenience of both parties, that neither may be compelled, unnecessarily, to attend during the whole of the day. But, if the parties meet at the agreed place during any part of the day, a tender and refusal, though not at the last convenient hour, is sufficient; for, in this case, neither party is put to inconvenience. So, if the place be fixed, and the party is to do the act on or before a certain day, or has the whole month to do it in, as in the present case; yet he cannot plead a readiness to perform, and the absence or want of readiness of the other party, at any time prior to the last convenient hour of the last day; and this, for the reason before assigned. Whether, in this latter case, the party bound to perform, may appoint an earlier day than the last for doing the act, and in such case, may compel the other party, after reasonable notice thereof, to accept, or to submit to the consequence of his absence or refusal, on the appointed day, need not be decided in this case, as the Court will not find it necessary to give an opinion on the second plea, which presents this question. The cases are certainly not clear on this point, and are somewhat at variance with each other. But there is no question, as to the doctrine above stated, that the tender or readiness to perform, must be stated to be on the last convenient hour of the last day, if an earlier period be not appointed.

In answer to this objection, it is insisted, by the defendant's counsel, that this plea does, in effect, allege a readiness and preparation at the last convenient hour of the 31st of May; because, if, in the words of the plea, the defendant was ready *in all the month of May* to deliver, he must have been ready on the last hour of the 31st of May, because that was part of the month, during the whole of which it is alleged he was ready. This argument carries with it such strong marks of good sense, and is so entirely logical, that one hardly knows how to raise a sound objection to it; and yet a plea like the present, is believ-



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 Savary vs. Goe.
 

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ed to be without a precedent. It is no vindication, however, of its correctness, that the Court arrive at the matter and real point of it by argument and logical deduction. The rules of law seem to require, that a plea should be direct in stating with sufficient precision the matter of defence, and should not leave it to be found out by inference, however strong and conclusive. It is said, that the defendant has assumed upon himself, the necessity of proving more even than his contract and the law imposed upon him, to which the plaintiff ought not to object. That he undertakes to prove his own readiness, and the want of it in the plaintiff, not only on the last convenient hour of the 31st of May, but during each and every hour of the whole month of May. To this, it may be observed, that this circumstance constitutes one of the demerits of the plea; because, if the plaintiff had taken issue on the whole plea, it would have been immaterial, since the defendant might have lost the cause, in consequence of not being able to prove a readiness during the whole month; and yet it was not material whether he was so or not, provided he was ready at the last convenient hour of the last day of the month. It is true, the plaintiff might have selected out of the plea, which runs over the whole month, the last convenient hour of the 31st, and taken issue on the readiness of the defendant, and his own absence or readiness at that time of the day, passing over the rest of the plea, with a protestation against its truth. But if, instead of doing this, he chooses to demur, he is certainly at liberty to do so.

In the case of *Lancashire vs. Killingworth*, it is laid down in the clearest terms, that if the plaintiff or defendant, as the case may be, plead a tender, or a readiness to perform, and that the other party was not at the place ready to accept, he must state at what time of the day he was there, and how long he continued, that it may appear that he staid to the last convenient hour of the day. It is true, that in that case, the declaration stated that the plaintiff was at the place *on such a day*, which he might well have been, and yet not be there at the

last convenient hour of the day. But yet, the Court not only condemned the plea on that account, but proceeded to state the proper form of pleading in such a case. This decision, as to the form of pleading, has never, to the recollection of the Court, been overruled or relaxed by any subsequent case; and such undoubtedly has been the usual form of pleading a tender or readiness to perform, in the absence of the other party. In the case of *Halsey vs. Carpenter*, Cro. Ja. 359, which was debt on a bond, to pay £304 to three persons *tam cito*, as they shall come of age, a plea of payment in the words of the bond, was considered bad on a special demurrer, because it did not state the time, place, and manner of performance; and yet that plea, unquestionably, covered every hour of the time, after the obligees came of age.

The third objection to the plea, stands upon still stronger ground than the one just mentioned; for, it is not only uncertain and argumentative, but the conclusion from the premises stated, is by no means so inevitable. Because the defendant was, in all the month of May, ready, prepared, and willing, to deliver the whiskey to the plaintiff or his agent, at the place of embarkation; the plea argues that the defendant must have been personally, or by his agent, at the place of embarkation, ready to deliver. But the conclusion does not necessarily follow, even if it were proper to get at it in this way. A man may truly say, that he is ready and prepared to pay money, or deliver an article at a particular place, for instance, at a spot near to, and within sight of his own house, and would have done so if the other party had come to receive it; and yet he may not have gone to the spot, in consequence of the non-appearance of the other party. To say the least of such a plea, it is uncertain and ambiguous; whereas, if the party would excuse himself for the want of a strict performance of his contract, he should show, by clear and direct allegations, that he did all on his part that was in his power, in order to perform.

In some of the cases, it is said, that though the other party

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Savary vs. Goe.

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be absent, still, the plea must state an offer to perform, which would seem to be rather an idle form. Still, this shows that the party must state himself to be present in person, or by an agent, since, if absent, he could not offer, although he might be ready to do so. Indeed, the want of the words "*obtulit solvere*," was deemed fatal on demurrer, in the case of *Cole vs. Walton*, notwithstanding the plea stated in express terms, that the defendant was at the place, and remained till sunset, ready to pay, but that the plaintiff was not there ready to receive. It is unnecessary to decide, whether, in such a case, an offer need be made or not; but this, and other similar cases, are strong to show, that the presence of the party bound to perform, ought to be distinctly stated, and such appears to be the uniform mode of pleading.

Judgment for plaintiff, and writ of inquiry to be executed before the marshal.

THE UNITED STATES *vs.* VANRANST.

Indictment against the defendant, as mate of the Lucy, he not being owner, for casting away and destroying the vessel, on the high seas, the Lucy being the property of Augustus Masol, a citizen of the United States.

In any case, more particularly in one which is capital, the circumstances relied upon, to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the accused.

What amounts to a casting away, was decided in the case of the United States *vs.* Johns, (vol. i. p. 363,) in this Court.

This case is within the provisions of the first section of the Act of Congress, passed 26th March 1804.

**INDICTMENT** against the prisoner, as mate of the Lucy, he not being owner, for casting away and destroying that vessel on the high seas, the said vessel being the property of Aug. Masol, a citizen of the United States. The evidence, though circumstantial, was very strong against the defendant; and it also appeared, from the testimony, that the plan for destroying the vessel, was laid before she sailed, by the owner himself. There was every reason to believe, that the cargo, belonging to the owner, was nothing more than billets of wood and straw, packed in about thirty boxes and trunks. It appeared, by the evidence, though not in the indictment, that the vessel and cargo were insured, and that there was a part of the cargo shipped by some person in Boston on freight, consisting of furniture. At the time the captain, mate, and crew, were taken from the Lucy by a vessel which met them at sea, the Lucy was filling rapidly, and was entirely water-logged, but she had not gone down when she was last seen.

It was contended—1. That the evidence of the defendant's guilt was merely circumstantial, and by no means strong enough

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The United States vs. Vanranst.

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to warrant his conviction. 2. That the evidence of the destruction of the vessel was insufficient, as she might afterwards have been picked up at sea and saved. 3. That the case is not within the Act of Congress, since the vessel was destroyed by the orders of the owner, who could not himself have committed an offence by destroying his own vessel, unless in a case coming under the second section; and of course, a person doing the same thing under his orders, could not be in a different situation. A man burning his own house, is not guilty of arson. 2 East's C. Law, 1024.

*WASHINGTON, Justice*, charged the jury. In any case, more particularly in one that is capital, the circumstances relied upon to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the party. It is for the jury to say, whether the circumstances in this case, have satisfied them that the prisoner was concerned in boring a hole into the bottom of this vessel, or in letting in the water, so as to render it necessary to abandon her.

2. As to what amounts to a casting away, within the meaning of the law, the point was decided by this Court, after great deliberation, in the case of *The United States vs. Johns*.

The present appears to be a strong case, within the definition of the terms as given in that case. The *Lucy* was left on the high seas completely water-logged, beyond the power of the vessel, into which the captain and crew were taken, to save her; without any other vessel in sight, and filling with such rapidity, as to render her loss almost certain, and the chance of her being saved by *ordinary means*, altogether hopeless. Besides which, she has never been heard of, so far as the evidence in this cause has gone, since the time when she was abandoned; now more than nine months.

3. As to this point, the Court is of opinion, that the ease of

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The United States vs. Vamranst.

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the defendant is within the first section of the law, if, in point of fact, he was concerned in the destruction of this vessel. The defendant is a person, not an owner, who, (if he committed the fact,) wilfully cast away a vessel unto which he belonged, being the property of a citizen of the United States. But did he do it corruptly? If no person but the owner was interested in the property, it was not; because the owner might destroy his own property himself, or cause it to be done, without committing an offence against this, or any other law. But in this case, there were insurers on vessel and cargo, and a cargo on board, belonging in part to other persons than the owner. It was corruptly done as to those persons. Had the owner, in this case, done it, he would have been guilty under the second section; only, that in that case, the indictment must have stated that it was done to the prejudice of the underwriter on the vessel, or of a merchant that had loaded goods in the vessel. But this is not necessary under the first section, if it come out in the evidence.

*The jury found a verdict of not guilty.*

**COLLINGS & Co. vs. Hope.**

What is called the custom or usage of trade, is the law of that trade; and to make it at all obligatory, it must be ancient, so as to be generally known, certain, and reasonable. A usage, of so doubtful authority, as to be known only to a few, and where merchants in the trade differ as to its existence, can never be regarded.

**MR. CLAUDIUS**, residing in Philadelphia, the agent of the plaintiffs, merchants at Rotterdam, was in the habit of procuring consignments to his principals, and of making advances on the shipments, to the amount of two-thirds of the invoice value, by bills on a house in London. Copies of the invoice and bill of lading, he enclosed to the house in London, as well as to the plaintiffs. In November 1807, the defendant proposed to ship a parcel of coffee to the house at Rotterdam, upon which Claudius agreed to make the usual advance, and drew a bill on the house in London, in favour of the defendant, for £260 sterling, which was duly paid. The vessel and cargo were lost; and this action was brought to recover back the advance thus made.

The defence was, that according to the usage at Philadelphia in similar cases, it was the duty of the agent to have had insurance effected on this property; and this not having been done, the plaintiffs were liable as if they had themselves been the insurers. To prove the usage, three or four merchants were examined; one of whom stated this to be the usage, but the others knew of no such usage. It appeared, that Claudius had sometimes made the insurance in similar cases, and in others that the shippers had; and upon the whole, it was pretty clear, that the one or the other effected the insurance, as was arranged between the parties. In this case, however, it was proved by Claudius, that he informed the defendant when the

shipment was made, that it was too late for him to have it done, and that the defendant said he was about to do it.

*WASHINGTON, Justice*, charged the jury. What is called the custom or usage of trade, is the law of that trade; and to make it at all obligatory, it must be ancient, (sufficiently so at least, to be generally known,) certain, uniform, and reasonable. A usage of so doubtful authority as to be known only to a few, and where merchants engaged in the trade differ as they do in this case, as to the existence of it, can never be regarded. The one now set up, is an unnatural one; for, although the shipper may consent to let the agent make the insurance, yet in general, he would prefer making his own bargain; and though the agent may insure to the amount of his advance, for the safety of his principal, yet he may decline doing it, if he is willing to trust to the general credit of the shipper. Beyond the sum advanced, he certainly cannot insure, without an express authority from the owner of the cargo; and this circumstance is strong to prove, that wherever the agent insures, he obtains such an authority from the shipper. This appears to have been the practice of this agent.

But even if the custom had been fully proved, this case would be an exception from it, as Claudius not only declined insuring, but the defendant undertook to insure.

*Verdict for plaintiffs.*



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Lorraine vs. Cartwright.

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## LORRAINE vs. CARTWRIGHT.

This Court has always deemed it proper to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in plain terms, and free from ambiguity; and in this respect the same measure of justice has been dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States.

Where an agent abroad, is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, stating the prices of the articles, and the amount of the charges on the shipments, the price stated in the invoice is the maximum by which the agent is to be governed. He has nothing to do with the actual cost of the articles.

If a consignee accepts a consignment, he does it on the terms prescribed by the shipper; he might have rejected it, but he cannot, after accepting it, refuse a compliance with the orders which accompanied it.

*Quere*, What will amount to a ratification of the unauthorized acts of an agent?

IN May 1809, the plaintiff was encouraged by Mr. Sheepshanks of Philadelphia, the agent of Bainbridge and Cartwright of Liverpool, to ship them a large parcel of cotton, on consignment; and at the same time, drew on them, by way of advance, a bill for £1000 sterling, (which was much less than the usual advance,) which bill was endorsed by Sheepshanks, and was duly accepted, the day before the house in England knew of the intended shipment of the plaintiff. The day after acceptance, the vessel with the cotton arrived at Liverpool, bringing a letter from the plaintiff, in which he expressed the sanguine expectations he had formed of obtaining a high price for this parcel of cotton, and his confidence in the judgment of the consignees, Bainbridge and Cartwright. The letter enclosed the invoice of the cotton, priced at 20 cents per pound, besides the charges; and the plaintiff, after stating that he al-

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*Leslie v. Cartwright.*

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ways wishes to give his agents the greatest possible latitude in his power, as they must be the best judges of the present and future probable prices, adds, that "they are to sell on arrival, provided the price should be such as to cover first cost and charges." Sheepshanks, at the same time, wrote to Bainbridge and Cartwright, informing them of the shipment, of the plaintiff's bill on them, and that the policy of insurance on the cargo, to the amount of more than 10,000 dollars, was lodged with him for security. On the day that the cargo arrived at Liverpool, Bainbridge and Cartwright wrote to the plaintiff, that they had accepted his bill before they knew of the shipment, and that they should run off a small part of the cotton the same day. In fact, they disposed of the whole cargo in a day or two after its arrival, at the highest market price at that time, though much below the invoice enclosed to them; and though there were at the time strong appearances that this article would decline in price, the unexpected disavowal of Erskine's treaty, and the renewal of the non-intercourse, by the United States, produced a sudden change, and cotton rose to a high price soon after the sale of this cargo. Bainbridge and Cartwright informed the plaintiff of this sale soon after it was made, and forwarded the account of sales to him, stating a balance in favour of the plaintiff. In answer to these letters, the plaintiff, on the 6th of October 1809, wrote to Bainbridge and Cartwright, that being then in a hurry, he could only acknowledge the receipt of their letter, but that he would in his next, write to them more fully. That he had drawn on them for £430, and in his next would give directions as to the application of the balance in their hands. On the 6th of November following, the defendant, Cartwright, being in Philadelphia, the plaintiff wrote to him, that he should bring suit to recover compensation for the breach of his orders. The defendant proved, that though the invoice enclosed by the plaintiff to Bainbridge and Cartwright, rated the cotton at 20, yet in fact, it cost him only 18 cents, and

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 Loraine vs. Cartwright.
 

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that that was the market price at Philadelphia when this shipment was made.

It was contended, by Ingersoll, for the defendant—1. That the words *first cost*, meant the market price, and not the invoice price. 2. That let the plaintiff's orders be construed how they might, still, Bainbridge and Cartwright had a right to sell, at least to the amount of the bill drawn upon them; although the price should be less than they were ordered to take. 3. That the plaintiff's letter of the 6th of October, and the bill which that letter announces he had drawn, is a complete affirmation of the conduct of Bainbridge and Cartwright, and a waiver of any demand against them for breach of orders.

*WASHINGTON, Justice*, charged the jury. This Court has always thought it right to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in terms, plain and free from ambiguity; and in this respect, the same measure of justice has been dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States.

The first inquiry is, what is the meaning of the terms used in the letter of the plaintiff, in relation to the sale of this cargo? *Prime or first cost*, is in itself somewhat equivocal, as it may mean the price at which it was purchased, or the market price at the time it was shipped, or the invoice price, which is generally understood to correspond with the market price, although frequently this is not the case. But, when an agent abroad, is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, pricing the articles and stating the amount of the charges on the shipment, nothing can be more clear, than that the sum stated in the invoice, is the *minimum* by which the agent is to be governed. As to the actual cost of the articles, it is almost impossible that the agent should know any thing about it, and very improbable that he should know even the real market price, at the place

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Lorraine vs. Cartwright.

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of shipment; and it is not to be supposed, that the principal could intend to refer his agent to an uncertain standard, when the order carries with it one which is certain. The goods may have cost the shipper much more than they are really worth at the time of shipping, or much less; and of course, the invoice price, more especially when it is referred to, as in this case it was, as fixing the sum for which the insurance was effected, fixes the only rational standard, by which the agent can and ought to be governed.

2. The plaintiff's bill did not authorize a breach of his orders, either in whole, or so far as to cover that bill. It was accepted before the defendant had notice of the shipment, upon the credit of the drawer and endorser; and even if it had been accepted afterwards, yet in either case, Bainbridge and Cartwright, if they accepted the consignment at all, it could only be upon the terms prescribed by the shipper. They might have refused to accept in the first instance, for want of advice or of funds; and might have done so even after the cargo was received, upon the ground, that they were restricted by the orders from selling, so as certainly to furnish funds for taking up the bill when it should become due. But it is entirely inadmissible for the defendant, to make their voluntary acceptance of the plaintiff's bill, an excuse for a breach of his orders.

3. There is no doubt, but that a principal may ratify the act of one who has acted in his behalf, as his agent, though without authority, or who has transcended his powers; and in this way give validity to the act, as if it had been strictly authorized in the first instance. This ratification may take place, not only directly, but by collateral acts; as if the principal, knowing all circumstances, sue for, accept, or even demand the payment of the purchase money, in this way indicating his willingness to affirm the sale. But in this case, the plaintiff did not demand the amount of sales, or even intimate that he would be satisfied to receive them. He drew for £430, which

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he had certainly a right to do, and informed Bainbridge and Cartwright, that he shall, in a subsequent letter, write more fully to them, and will then give directions as to the application of the balance in their hands; so that he reserves the right of deciding as to his future conduct, until the time when he should write again. It is possible, that the plaintiff wished to obtain further information as to the circumstances under which the sale of his cotton had taken place, and at the moment, might even have inclined to submit to what had been done. But his letter of the 6th of October, certainly did not commit him so far, as to prevent his subsequent refusal to sanction the sale which had been made. Accordingly, in his next letter, dated the 6th of November, he informs the defendant that he shall bring suit, to recover a compensation for the damages he had sustained by the breach of his orders. What those damages should be, you, gentlemen, must decide.

*Verdict for upwards of 3000 dollars.*

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Clason et al. vs. Smith.

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**CLASON & DUNHAM vs. SMITH.**

**Insurance.** A misrepresentation, which will avoid a policy, must not only be *false*, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk, when otherwise he would not have done so. If it had no influence, or ought to have had none, it cannot be said to have been material.

The mere expression of an opinion by the assured, or an expectation as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a material misrepresentation. It was the folly of the assurer, not to have inquired into the grounds of the opinion.

**ACTION** on two policies of insurance; one on the ship *Heratio*, and the other on the cargo, at and from New-York to Tonningen, at a premium of 20 per cent. She sailed with her cargo on the voyage insured, in February 1810, and has never been since heard of. There were two questions made in the cause—1. As to the seaworthiness of the vessel. 2. A material misrepresentation.

*WASHINGTON, Justice*, in the charge, summed up the evidence, and then left the question of seaworthiness to the jury.

As to the second question.—The misrepresentation asserted to have been made, is contained in a letter from the plaintiffs to their agent in Philadelphia, of the 23d of January, in which they agree to give 15 per cent. premium, and add, “we have no doubt, but that we could get the insurance effected in New-York at that premium.” The defendant refused to take the risk for less than 20 per cent., and after some time the insurances were completed at that premium. The evidence proves, that applications were made to the different offices, the

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Olson et al. vs. Smith.

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whole of whom refused to take the risk at all. In point of fact, then, this statement in the plaintiffs' letter of the 23d of January, was not true; and in this respect, the statement cannot be defended at the bar of conscience. But the question to be decided by the Court and jury is, how stands the law in relation to this representation? A misrepresentation, to avoid a policy, must not only be *false*, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk at all; when otherwise, perhaps, he would not have done it. If, in point of fact, it had no influence, nor ought to have had any in these respects, then it is impossible to say that it was material. Now, it is clear, that in this case, the misrepresentation had no influence in affecting the rate of premium; because the underwriters proceeded upon their own judgment, and demanded 20, instead of 15 per cent., as the rate of premium; nor ought it induce them to take the risk at all, or in any respect to influence the rate of premium. The letter asserts nothing, but merely expresses an *opinion*, that the insurance could be effected in New-York, at 15 per cent. The very terms used, imply that the opinion was not formed on any thing certainly ascertained as to the fact; because if that had been the case, it would have ceased to be a doubt. The mere expression of an opinion, or an expectation, as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a misrepresentation sufficiently material to avoid a policy; because it is the folly of the other party, not to inquire into the grounds of the opinion. But, when the opinion is such as cannot possibly be well founded, and bears on the face of it the full evidence that it is unauthorized, it becomes obviously harmless, so far as the insurer is concerned; and the conclusion becomes irresistible, that he was not misled, or if he was, that he has only himself to blame for it. Such is the present case. The plaintiffs say, they do not doubt that they could have the insur-

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Clason et al. vs. Smith.

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ance effected in New-York, at 15 per cent. The insurer cannot possibly believe this to be a candid opinion, because, if it was, why should the plaintiffs come to Philadelphia, and at once offer to give the same premium here, and finally, consent to give 20 per cent. ? If, indeed, the plaintiffs, by this uncandid statement, had endeavoured to get the insurance effected for less than fifteen per cent., and had succeeded, the defendant might have been deceived by the misrepresentation, inasmuch as it would have assigned at least a plausible reason for applying to the underwriters in Philadelphia. But even in that case, the statement would not have amounted to more than an opinion. If a man, in order to enhance the value of his property, asserts his belief, that he could get for it, from those who know its value, a certain sum, and offers it for the same price; or even for more; and in truth he knew that he had no just ground for the opinion he had expressed, but the contrary; we do not think that a Court of law or equity would, on that account, set aside the contract of sale; for, it was the folly of the purchaser to govern himself by a mere opinion, without examining into the facts on which the opinion was founded. Nothing can be more clear, that in this case the misrepresentation was not material.

*Verdict for plaintiff.*



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Coles et al. vs. The Marine Insurance Company.

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COLES ET AL. vs. THE MARINE INSURANCE COMPANY.

**Insurance.** If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage or wear and tear, which, without the action of any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks or the like, these are perils against which the insurer agrees to indemnify.

It is not sufficient for the insured to prove, that there were storms during the voyage, unless he can fairly trace the injury sustained to their influence.

What will be deemed a misrepresentation by the assured.

It is very certain, that every thing which concerns the state of the vessel, at any particular period of her voyage, is generally considered material to the risk.

What will be deemed a deviation from the voyage insured; and under what circumstances a vessel may proceed to a port, out of her direct course; and for what causes she may remain at such port.

**ACTION** on a policy on the Brothers, on a voyage from a port on the Brazil Coast, to Canton, with liberty to touch or stop at the Pegu islands, or any other islands, ports, or places, the master may think proper, to take and trade for refreshments, sandal wood, skins, birds nests, or any other articles. Premium 10 per cent., to return 2½ on safe arrival; valued at 10,000 dollars; 9000 insured; warranted American property.

This vessel sailed from the port, in company with a ship called the Hope, belonging to the plaintiffs, under an agreement to keep company during the voyage, which was the same with both. On the 13th of August 1809, about two months after this vessel had left the port, on the voyage insured, the master, who was also a part owner, wrote to the plaintiffs, by a vessel he met with at sea, that at that time he had met with

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no misfortunes with his boats, &c.; that he had sailed in company with the Hope as her consort, and that they kept company very well when the weather was good, but when otherwise, she, the Brothers, could not keep way with the Hope. The letter, in other parts, plainly imports, that these vessels were to keep company during the voyage. This letter was shown to the defendants when this insurance was effected, and was by them annexed to the order. It appeared, by the evidence, that this vessel, in her voyage, was exposed to many storms and tempests, in which she suffered considerably, but principally in her sails and rigging. She stopped at the Pegu Islands, having previously stopped ten or twelve days at Tomgataboo, waiting for the Hope, from which she had been separated. From the Pegu islands, she went to the Norfolk island, entirely out of the course of the voyage, but, as was proved by the mate, it was the only place at which she could obtain refreshments, of which she stood in need. From Norfolk island she went to Fanning's island, where she remained three months, for the purpose of repairing the vessel. Thence she went to Guam, where repairs were again necessary; and not being able to repair there, she went to Manilla, where, after a survey ordered by the Court at that place, she was sold under an order of the Court, it appearing that the costs of repairing her, would amount to nearly as much as she was worth.

The objections made to the recovery were—

1. That the loss was not occasioned by those perils of the sea, against which underwriters insure, but by the ordinary deterioration of so long a voyage. Marsh. 492. 540. 463.
2. By the captain's protest, made at Manilla, (which was read by consent,) it appeared, that on the 14th of August, the Brothers had met with much stormy weather, by which her sails and rigging were much injured. Of course, the letter of the 13th of August, which was shown to the underwriters, was a misrepresentation, so material as to vitiate the policy.
3. That the vessel had been guilty of a deviation in two re-

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specta—1. In waiting at Tomogataboe for the Hope; and—2. In going to Norfolk island, out of the course of her voyage. In waiting three months at Fanning's island; and in going to Manilla to repair, when she might with as much, or more ease, have gone to Canton.

WASHINGTON, Justice, charged the jury. The loss laid in the declaration, is by a peril of the sea. The cause of the loss forms the only point of your inquiry.

If it arose from the ordinary circumstances of such a voyage as this was, as from sea damage, or the wear and tear, which, without the action of any extraordinary cause, was to be expected, the insurer is not liable. But, if it happens in consequence of the violence of the winds and waves, running on rocks, or the like; these are perils against which the insurer agrees to indemnify. It is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to that cause; for, it may nevertheless appear, that the injury which caused the breaking up of the voyage, arose from the ordinary circumstances of a long voyage, as this was. To obtain satisfaction on this point, it may be well to inquire, what was her real situation when she arrived at Manilla? At New-York, the vessel was valued, with her standing-rigging, at \$3500 dollars. At Manilla, she was valued at 2900 dollars. The repairs necessary to be put upon her at Manilla, were valued at nearly 2500 dollars; and she sold at 1250 dollars. Could the repairs necessary upon the ordinary wear and tear of this voyage, about eighteen months, have amounted to the sum above mentioned?—What were these repairs? They embraced the injury done to her coppering, sheathing, sails, and rigging; and it is in evidence, that she was exposed to a number of tempests, and once ran upon a bar, over which she was drawn by the bands. You must decide, from these facts, whether the injury resulted from the ordinary

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wear and tear attending such a voyage, or from the bad weather, to which it is proved she was exposed.

2. Did the letter of the master and part owner of this vessel, of the 13th of August, amount to such a misrepresentation, as, in point of law, avoids the policy? To avoid a policy on the ground of misrepresentation, the representation must not only be false, but it must be material in relation to the undertaking of the insurer, either as to the rate of premium, or as to his taking the risk at all.\* If the injury stated in the captain's protest, is construed to refer to injuries sustained prior to the 13th of August, when his letter was written, then the statement in that letter was not true.

The next question is, was it material? Would an underwriter, acting with reasonable caution, have insured for the same premium, having a knowledge of the fact stated in the protest, as he would upon a view of the letter of the 13th of August, supposing the letter to relate to what had occurred prior to the 13th of August? It is very certain, that every thing which concerns the state of a vessel, at any particular period of her voyage, is generally considered material; and if the master, in his protest, refers to what had happened prior to the 13th of August, it would seem, that he materially misrepresented his situation. On this point, there is some doubt, and the question is left to the jury. Where the materiality of a concealment or misrepresentation is clear, the Court feels no reluctance in expressing its opinion on the point.

3. The next point is deviation.

It is said, that there was a deviation—1. In waiting for the Hope; and 2. In going out of the course of the voyage—unjustifiable stoppage, and finally, going to Manilla instead of Canton.

1. As to the stopping for the Hope. Any departure from the usual course of a voyage, or stopping at any place, even in

\* See *Claude & Dunham vs. Smith*, ante, p. 145.

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the course of the voyage, which is not permitted by the policy, is a deviation which will avoid the policy, unless it took place for some justifiable cause; such as to repair, obtain necessary refreshments, avoid an enemy, or the like. This stoppage is not justified on any of the above grounds. But, though not stated in the policy, it was tacitly allowed, that this vessel might stop a reasonable time in order to keep company with the Hope, because the defendants knew when they took the risk, that these vessels had agreed to keep company, (an agreement which it was not then possible to countermand,) and as one sailed much faster than the other, (as the defendants also knew,) it was to be expected that they would separate, and might be obliged to wait for each other. But this could not be understood as exceeding a reasonable time; and therefore, the question of deviation, under this head, must depend upon your opinion, whether the stoppage of the Brothers Tomogtaboo, for twelve or fourteen days, waiting for the Hope, was reasonable or not.

2. As to the departure of this vessel from the ordinary course of the voyage, the rule, as laid down in the case of *Winthrop vs. The Union Insurance Company*, is, that if the termini of the voyage be fixed in the policy, the vessel cannot go out of the usual course of the voyage, notwithstanding she is permitted to stop and trade at any ports or places. That is the present case; and no evidence has been offered to show, that in a voyage like the present, it is the usual and established course to go out of the direct course, from one of the termini to the other. Nevertheless, the deviation to Norfolk island will not avoid the policy, if, from the evidence, you think it was necessary for the purpose of obtaining refreshments. Neither will the stay of three months at Fanning's island have this effect, if you are of opinion that the ship was employed in necessary repairs to the vessel. But if the vessel could have got

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from Guma to Canton, in the situation in which she was, we think she was not justified in going to Manila, merely because, by going to Canton, she must then have ended her voyage, before she had completed her cargo; because she had no right to go out of the usual course of her voyage, for the purpose of trade, or for any other reason than such as would justify a deviation in ordinary cases.

*Jeters, Justice*, thought that on such a voyage as this, the vessel was not confined to the direct course of the voyage.

*Verdict for plaintiffs.*

Calhoun vs. Vechio.

## CALHOUN vs. JOHN &amp; I. VECHE.

action to recover the stipulated price of a quantity of looking-glass, which the plaintiff advertised as white glass of superior quality, and which the defendants purchased, after having particularly examined the same; signing an agreement stating the purchase, and the price to be paid on taking the glass away. On the following day, one of the defendants returned, re-examined the glass, and said it was of inferior quality, and refused to comply with the agreement of the preceding day. The glass was, in fact, of very inferior quality.

The Court held that the defendant, having examined the glass, and given the agreement to purchase it, he could not afterwards claim to be relieved from his bargain, by the discovery that the quality of the glass was inferior, and that it was not worth the price agreed to be paid for it.

The statement of the quality of the glass in the advertisement, did not amount to a warranty, inasmuch, as the defendants did not rely upon the advertisement, but on their own judgment, formed after an examination.

**ACTION** on the case, to recover the stipulated price agreed to be paid by the defendants, for six cases of looking-glass plates. The first count is *indebitatus assumpsit*, for 9123 dollars, 5 cts., for goods sold and delivered. 2. *Quantum valeret*. 3. A special count, reciting a *collageum* respecting six cases of looking-glass plate, the property of the plaintiff, in which the plaintiff agreed to sell, and to deliver the same to the defendants, and they agreed to purchase and to accept the same, and on delivery thereof, to pay to the plaintiff 9121 dollars, 5 cts.; that the plaintiff was ready, and offered to deliver the said glass, but the defendants refused to accept or pay for the same, whereby, &c. Fourth count, like the third, except as to the breach, which states that the plaintiff was ready and willing to deliver, but the defendants fraudulently absconded and hid themselves, to prevent a delivery on offer. *Plac. non accumsit*. It appeared, by the evidence, that the plaintiff, having re-

## Calhoun vs. Veckie.

ceived from St. Petersburg a large quantity of looking-glass plates, of various sizes, advertised the same for sale, calling them *white glass of superior quality*. The defendants being merchants of New-York, and largely engaged in selling looking-glasses and other ornamental articles, seeing this advertisement, came on to Philadelphia to purchase some of the glasses thus advertised. The defendant, John Veckie, requested some of the boxes to be opened, of which he examined a number. He observed that the quality was not good; many, or most of the plates, being sandy. The plaintiff answered, that he wished he could make them better,—but that the defendant must judge and decide for himself as to the quality, and might examine as far as he pleased. The defendant proceeded with his examination, which he repeated on different days afterwards. He inquired what would be the amount of six cases which he selected; Nos. 12, 15, 16, 17, 18, and 19. The plaintiff answered, 9122 dollars, or thereabouts, after calculating the amount from an invoice, which was shown to the defendant. But the real amount was 9121 dollars, 5 cts. The defendant then agreed to purchase the said six boxes for the latter sum, and signed an agreement, dated the 18th of November, stating that he had purchased the same at that price, to be paid for on taking them away. The defendant, after the agreement was concluded, inquired what was to be done in case any of the plates should be broke. The plaintiff answered, that he would deduct them from the amount. The defendant then proceeded to the examination of the different boxes, in order to ascertain the breakage. One plate was found broken in one box, and was laid aside. Two boxes were found damaged, which the plaintiff agreed to replace by two others, or to deduct them from the bill, or to have the damage appraised. The defendant went away, and returned the next day with Mr. Natt, to assist him in examining the glass; and at length he went away, declaring that he would not give for the same, or take the glass, at all. The defendant left Philadelphia,



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Cathoon vs. Veeho.

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and was overtaken on the road, served with process in this suit, and brought back. He again called at the plaintiff's counting-house, and said he had concluded to take the glass. He again examined the glass for two hours, then went away, and did not again return. The other defendant afterwards came to the plaintiff's counting-house, and asked to see the glass which his partner had purchased, which he examined, and then went away. At the time the defendant went with Natt, he said, after examining the glass, that it was not of good quality, and he would not take it. The plaintiff's clerk asked him if he wished to be off his bargain, to which he replied no, if they would give him good glass.

The defendant examined a number of witnesses to prove that this glass was of very inferior quality for the price. Much contradictory evidence was given on this point.

It was contended, by Rawle and Charles J. Ingersoll, for the defendants, that the contract of sale was not closed on the 19th of November, but remained open until the defendant should finish the examination of all the boxes, which he had not done on that day; since it appears, that it was afterwards continued, and a new stipulation made on the part of the plaintiff, as to broken and damaged glass. Consequently, that *indebitatus assumpsit*, would not lie on this executory contract; but the plaintiff, if he can recover at all, must do so on the special counts, which are not proved, inasmuch, as no delivery of the glass, or offer to deliver, was made. That the quality of the glass turning out to be different from that mentioned in the advertisement, the defendants were at liberty to rescind the contract of the 19th, at any time before the glass was taken away.

WASHINGTON, Justice, stopped Mr. Levy, who was about to argue the cause for the plaintiff, observing that this was a very plain case. This is a contract of sale, concluded on the 19th of November; as much so, and as binding, as a sale can possibly be. The terms of sale were agreed upon, committed

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 Callahan vs. Vechio.
 

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to writing, and signed by the defendant, with as much minuteness as was necessary. The article sold, was a quantity of glass contained in six cases, selected by the defendants, and designated by precise marks. The price was fixed, as also the time of payment. Nothing was left for future adjustment. The examination, which afterwards took place, by the permission of the plaintiff, did not, as was argued, open the contract, but it was for the purpose of ascertaining the quantity of broken and otherwise damaged glass, the value of which, the plaintiff, subsequent to the closing of the sale, agreed to deduct from the 9121 dollars, 5 cts., agreed by the defendants to be paid, by the contract of the 19th of November. And if any thing were wanting, to render this a perfect and complete sale on that day, the plaintiff then apprized the defendants that the six cases of glass were, from the time the agreement was signed, at the risk of the defendants, to which they, by their silence, tacitly assented. The subsequent refusal of the defendants to take the glass, dispensed with the necessity of an offer on the part of the plaintiff to deliver it, even if that had been necessary. The glass was, to all intents and purposes, the property of the defendants; and they might have taken it away when they pleased, upon paying, or offering to pay, the price agreed upon.

What, then, is to release the defendants from their purchase? The statement of the quality of the glass, in the plaintiff's advertisement, did not amount to a warranty; inasmuch as the defendants did not rely upon the advertisement, but upon their own judgment, to be formed after an examination. It is natural for the owner of property, and the daily advertisements of real and personal property contain the fullest evidence of the fact, to give a character to what he offers for sale, which, in the judgment of other people, it does not deserve. And if these statements of the partial owner, should be converted into warranties, where the purchaser has determined to rely on his own judgment, there are probably few sales that would stand, if the purchaser should become dissatisfied with his bargain.

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Calhoun vs. Veehio.

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Has there been any fraud practised by the plaintiff in this case? Has he concealed, or misrepresented any thing in relation to the quality of this glass, which he knew to be material and false? For, if this were proved, it would be sufficient to set aside the contract. But nothing of this kind is even pretended. The plaintiff stated the glass to be of superior quality, and possibly, he had been so informed by the consignor, (for, it is to be remarked, that when the advertisement was inserted, the cargo was not landed,) or he may have given it this character without authority, in order to entice purchasers to come forward. But, he knew, at the same time, that no person would be so incautious, as to purchase without examination. The defendant in particular, was requested to examine, and to judge for himself; after he had, on a partial view of a few pieces, expressed his disapprobation of the quality. The examination was then pursued, as long as the defendant thought it necessary; and it was afterwards, that he selected the six boxes, and closed the purchase of them. If he did not choose to open the whole of the boxes, it was a matter in which he alone was concerned; and a difference in the quality of the glass not examined, from that which was, would not authorize him to rescind the bargain. But the fact, from the evidence, seems to be, that there was no such difference.

The defence, then, comes to this; that the defendant has, upon the whole, made an improvident bargain. He has agreed to pay more than the article is worth; and if it appeared, that he had done so to a much greater degree than is proved, it is not competent to this, or any other Court, to annul, or even vary, the contract, further than the parties have agreed. The plaintiff is therefore entitled to a verdict, for the principal and interest of his account.

The jury found a verdict for the whole sum claimed; the value of the broken glass having been deducted, and the plaintiff agreeing to deduct from the verdict, the value of the damaged glass.

## CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1812.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
Hon. RICHARD PETERS, District Judge.

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### SCHWARTZ & Co. vs. THE UNITED STATES INSURANCE COMPANY.

Action for a return of premium, on the insurance of the cargo of the Margaret, at and from Batavia to Baltimore.

Fraud is an answer to an action for a return of premium, not from any merit in the defendant, which justifies him in retaining money, which *ex quo et bono*, is not his, but from the demerit of the plaintiff, which excludes him from the aid of a Court, to draw it out of the defendants' hands.

The Court is not disposed to make nice distinctions between grades of fraud. The true rule is, that if the insured, by deception and false pretences, induces others to take a risk, which, had the truth been disclosed, they would have refused, or would have taken on different terms, thereby securing to himself a chance to claim an indemnity in case of loss, or a return premium in case of safe arrival; it is such a fraud as ought to defeat his claim to a return of premium.

**ACTION** for a return of premium, paid on a policy effected on the cargo of the Margaret, 20th of January 1807, at and from Batavia to Baltimore, at 7½ per cent., valued at 15,000 dollars; the coffee valued at thirty-four dollars per picul, the sugar fifteen dollars, and the pepper at twenty dollars. This

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is the same voyage as that mentioned in the case of the same plaintiffs, against the Insurance Company of North America, *ante*, p. 117, and the same evidence was given. The plaintiffs had insured on the cargo of this vessel, at other offices, to the amount of 75,500 dollars, prior to the one in question; and their interest on board, distinct from Arnold's, amounting only to 52,536 dollars, this suit is brought to recover back the premium, on the ground of abort interest.

The evidence not noticed in the report of the former case, but which becomes important in this, is as follows—

By the letters written by captain Herd to the plaintiffs, from Batavia, and which were received two days before the first insurance on either vessel or cargo was made, the plaintiffs were informed that the cargo, on their account, would amount to upwards of 50,000 dollars, besides a conditional contract he had made with the Dutch government, for 1000 piculs more of coffee; and they were advised by him to insure about 75,000 dollars on the cargo. After Herd had nearly taken in the greatest part of his cargo, he found the vessel had sprung a leak, which compelled him to unload, and to caulk and sheath, and put other repairs on her, which cost about 10,000 dollars. It was about that time, that Arnold became interested in the cargo; and the contract mentioned in the former case was entered into. Herd, in his deposition, swears, that he never gave to the plaintiffs, any information respecting the interest of Arnold in the cargo, or which contradicted his letters; which represented the whole cargo as belonging to the plaintiffs; until July 1807, after his capture, in which last letter he unfolded the whole nature of the transaction. This letter was received by the plaintiffs on the 30th of August 1807, and a letter was immediately written to the agent of the plaintiff, in this city, directing him to abandon, and to claim for a total loss. This was done on the 31st, and refused. Some time after this, the agent was authorized to offer a compromise to the different offices, to receive 75 per cent. of the whole sum insured, with a promise

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to furnish the necessary proofs of property and loss, as soon as they should be received from Barbadoes, where the condemnation took place. This was refused, unless the agent would oblige himself to repay the money, if it should appear that the plaintiffs were not entitled to it; which was not acceded to. Actions were accordingly brought, and a total loss claimed, without any counts for a return of premium being inserted in the declaration. The interest of Arnold, and the scheme pursued for covering his interest, were not communicated by the plaintiffs to the underwriters, but came accidentally, and in some other way, to their knowledge.

The claim for a return of premium, was resisted upon the following grounds. 1. Fraud in the plaintiffs, (who, it was contended, must have known of Arnold's interest in the cargo,) in attempting to cover, and to insure belligerent property as neutral. 2. That if they did not know it, still, they are chargeable with the fraud of captain Herd, their agent and attorney. 3. That the cargo having been on board, or nearly so, before the interest of Arnold commenced, the policy attached, the policy being at and from; and of course, no claim can be made for a return of premium, independent of the question of fraud. Upon the first and second points, were cited, Park, 214. Ed. 4. 2 Marsh. 652. 1 Binney, 116. 3 Caines, 90. 2 Johnson's Cases, 58. 4 Dall. 298. 2 Johnson's Cases, 310. On the third point, were cited, 8 Johns. Rep. 1. Park, 299, last ed. 1 Marsh. 165. 840. 3 Johnson's Cases, 10.

For the plaintiffs, the fact of the fraud was insisted not to be brought home to the plaintiffs; and if it were, the law was disputed. As to the third point, it was answered, that the vessel *not* being seaworthy to receive the cargo, according to the decisions in the cases cited by the defendants, the policy of course never attached, until after she was repaired, and the interest of Arnold commenced. As to the plaintiffs being chargeable with the fraud of captain Herd, it was said, that his conduct amounted to barratry, upon the argument of the defendants, for which

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they are liable; and of course, they cannot urge that, as a reason against a recovery of the premium. Any gross malversation by the master, is barratry. 2. Campbell's N. P. 149.

*WASHINGTON, Justice*, charged the jury. This is an action for money had and received, to recover back the premium paid by the plaintiffs to the defendants, for short interest, in the cargo of the Margaret; the whole having been covered by policies, prior to that underwritten by the defendants. The ground of the action is, that the defendants were never exposed to the risk, against which they bound themselves to indemnify the plaintiffs, and for which they received the premium; and consequently, that they cannot, in conscience, retain it. The principle of this action is unquestionably founded in sound law.

The answer to this demand is, that the plaintiffs have been guilty of a fraud, in procuring this insurance to be effected; and that no Court will, in such a case, lend its aid to recover back the money paid for effectuating such a purpose. Generally speaking, this too, is sound law. This is an equitable action, and the plaintiffs should derive their right to recover from pure sources. The title of the defendant, in such a case, to retain what he has received, and which, *ex equo et bono*, is not his; does not arise from any merit in himself, but from the desert of the plaintiff, which denies him a remedy to draw it out of the hands of the defendants.

The alleged fraud consists in covering belligerent property by false papers, and insuring it as neutral. The first question, therefore, is a question of fact, for the decision of the jury; whether the plaintiffs were knowingly guilty of the imputed fraud. The second is a question of law, whether this is such a fraud, as ought to prevent the plaintiff from reclaiming in a Court of justice, the premium which he has paid.

In ascertaining the fact, on which the law is to arise, you have direct evidence, opposed to that which is merely circumstantial. The former consists in the information given by cap-

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tain Herd to the plaintiffs, on which they appear to have acted; by which they were led to conclude, that the cargo was entirely their own, and about equal in value to the aggregate of the sum insured on it. The circumstances opposed to this positive proof are, the small capital carried from the Isle of France to Batavia; the knowledge which William M'Faden, during his life a partner of the plaintiffs, had of the connexion with Arnold in the Tranquebar voyages; and some others of less weight. But it may be observed, that though Arnold might be willing to take a share in the short trading voyages from Batavia to Tranquebar, it by no means followed, that he would engage in a shipment to the United States; and at all events, as fraud is never to be presumed, the jury ought to be very well satisfied with the evidence offered to prove it, before they should believe it to have existed, especially when it is opposed by strong proofs to the contrary.

We wish it were in our power to speak as favourably of the conduct of the plaintiffs, after they received captain Herd's letter, which contained a full and candid disclosure of the transactions at Batavia, in relation to the interest of Arnold in this cargo. Had they then communicated this information to the underwriters, it would, we think, have been very difficult to have brought home to the plaintiffs, a knowledge of, or concern in, this unfair transaction. But the demand which they made of a total loss on the whole sum insured; their offer to receive 75 per cent. of the whole, at a subsequent period, after they had more time for reflection; and their concealment of the truth from the defendants, until after they had by other means obtained a knowledge of it; these, if they do not so connect the plaintiffs with the transactions at Batavia, as to induce a belief that they had authorized, or knew of them, when these insurances were effected; do at least amount to an adoption and ratification of what was done by their agent; which subjects them, in point of law, as much to the charge of fraud in the first instance, as if the fact was brought home to them



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by the clearest proof. This being the case, it becomes unnecessary to give any opinion on the second point made by the defendants' counsel.

The next inquiry is, whether this is such a fraud as ought to bar the plaintiffs' right of recovery? It is much to be wondered at, that only five cases are to be met with, in which this question has received a judicial decision. The cases of *Wittingham vs. Thornburgh*, 2 Vern. 306. *De Costa vs. Scandrel*, 2. P. Wms. 170, and *Wilson vs. Duckett*, 3 Burr, 1361, in which the premium was decreed to be refunded, notwithstanding the fraud of the insured in obtaining the insurance, fall short of establishing the point for which the plaintiffs' counsel contend. In the two former, the insurers were plaintiffs in equity, seeking to set aside the policies on the ground of fraud; and since the insurers could not, in conscience, retain the premiums, no matter how great the demerit of the insured might be, a Court of Equity, governed by its own principles, could not relieve the insurers on other terms, than compelling them to disgorge that to which they had no equitable right, and placing the parties in the situation they were in, when the contract was entered into. The other case, though tried at law, was under a decree of the Court of Chancery, in which the insurers were complainants, and offered in their bill to repay the premium. The case of *Tyler vs. Horn*, mentioned in Park, 218, which was decided at *Nisi Prius*, in 1785, since the Revolution, and is, of course, not authority in this Court, establishes the doctrine, that, in a case of *gross fraud*, the insured cannot recover back the premium. *Chapman vs. Frazer*, which was decided at a still later period, but in the King's Bench, is so loosely, stated in 2 Marshall, 652, that it is difficult to discover the precise principle which it establishes.

This Court does not feel itself disposed to countenance a distinction between different grades of fraud, as affecting the right of the plaintiff, in actions of this kind. It is believed, that upon general principles of law, as well as of sound policy and

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morality, it may be safely laid down as a rule, that if the insured, by deception and false pretences, induces others to undertake a risk, which, had the truth been disclosed, they would not have taken at all, or would have done so on different terms from those agreed upon, thereby securing to the insured a chance to claim an indemnity in case of loss, or a return of premium in case of safe arrival; it is such a fraud as ought to defeat his right to maintain this action, for the premium. That is precisely the present case. The plaintiffs had this chance, and it might in all probability have been realized, had this vessel been lost at sea, or the evidence of the real transaction been otherwise kept from public view. The bill of lading and invoice, the ordinary proofs of property and value, were sufficient to authorize a recovery of the sums insured, or might have induced the underwriters to pay without a suit. If the jury think with the Court on the facts of this case, their verdict ought to be for the defendants.

*Verdict for defendants.*

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Azuria & Co. vs. The Insurance Company of Pennsylvania.

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**AZURIA & Co. vs. THE INSURANCE COMPANY OF PENNSYLVANIA.**

The invoice, stated, in the record of the condemnation of the vessel insured, to have been found on board, at the time of capture, and the answers of the mate, to the standing interrogatories, were admitted in evidence, on the part of the defendants.

**ACTION** on a policy on goods on board the Mercer, at and from Philadelphia to Teneriffe. The vessel and cargo were captured, carried into Halifax, and condemned as enemies' property. The record of the sentence of condemnation, was read by the plaintiffs' counsel. The defendants' counsel moved to read—1. The order of the Court directing further proof. 2. The invoice stated in the record, as one of the papers found on board at the time of the capture, and particularly referred to by the captain and part owner, in his answer to the standing interrogatories; a copy of which interrogatories, with the answers, was proved by the depositions of witnesses taken in this cause, and by the answers of the mate to the standing interrogatories, in order to contradict his deposition referred to. This was objected to by the plaintiffs' counsel; but the Court thought the evidence offered came within the rule laid down in the case of *Marshal vs. The Union Insurance Company*, and admitted it to be read. The invoice, offered to be read, being the one referred to in the depositions of two of the witnesses, taken in this cause, is made part of them; and there can be no doubt of the propriety of reading the answers of the mate, to the standing interrogatories, for the purpose of discrediting him.

**REMARKS.** It was stated by Mr. Dallas, on the part of the plaintiffs, that no objection was made to the reading of the interlocutory order, directing further proof.

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Lessee of Keene vs. Harris et al.

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the latter claiming and holding the land under and in right of the proprietor, would, in a reasonable time, perfect his title, by paying the consideration and obtaining a patent. It never could extend to one who claimed adversely to the proprietor, and who for so long a period has taken no steps to perfect his title. This is precisely the case of the defendants, who took possession of these lands, claiming under Connecticut, and in open opposition to this commonwealth.

Tilghman, for the defendants, admitted, that if the defendants settled this land, claiming a right to do so under Connecticut, that they could not succeed.

On this admission, the Court left this fact to the jury, with directions to find for the plaintiff, if they should be of opinion, that the defendants claimed under Connecticut.

*Verdict for plaintiff.*

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The Case of the Tulip.

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## THE CASE OF THE TULIP.

If trading with an enemy be cause of condemnation, which it clearly is, *a fortiori* carrying despatches to the enemy, by an American vessel, in time of war, is so. It is more criminal, because more useful to the enemy, and more injurious to this country. The citizen makes himself, *pro hac vice*, an enemy, and his vessel enemies' property, and renders himself liable to prosecution as a traitor, or as guilty of a misdemeanor, as the case may be.

THIS case came up by appeal from the District Court, which condemned the vessel and cargo, both the property of Mr. Shaw of New-York, (captured on her passage to Lisbon by an American privateer,) on the ground of her having on board despatches from Mr. Foster, the British minister, to Lord Castlereagh, and a messenger sent with the same, who, by a contract between Mr. Foster and the owner, was to be put on board some vessel going to England; or if none such offered, was to be landed at some port in England. In consideration of this service, an open letter was given by Mr. Foster to the owner or master, directed to all British national vessels and cruisers, requesting them not to interrupt this vessel in her voyage. A particular statement of this case, will be found in the sentence of the District Court.

Binney and Hopkinson, objected to the sentence of the District Court—1. Because the despatches themselves had not been made exhibits in the case, so as that the claimant might have an opportunity to show that they were not of a nature to impute a crime to the owner in carrying them, but that the judge had, in lieu of them, filed a certificate, stating that they did communicate important information to the enemy.

2. That admitting the conclusion of the judge, as to the pur-

port of the despatches, to be correctly drawn, still, it was no cause of condemnation in a Prize Court. They contended, that the offence of a citizen trading with the enemy, or conveying information to them, is punishable only by the municipal law, on the ground of a breach of his duty of allegiance to his country, with which the law of nations, the only rule of correct decision for a Prize Court, has nothing to do. They cited the following cases. 4 Rob. Rep. 210. 216. 6 Idem, 420. 430. 436. 465. 344. Dougl. 513. 594. 1 Coll. Jurid. 130. 134. 152. 2 Rob. 64. Bynk. 24. 167. 4 Dall. Appendix, 4. Act of Congress 6th July 1812.

Dallas, for the appellees, endeavoured to show from the papers, that the cargo belonged to Shaw & Co. of Dublin, in whose favour the bill of lading was made out. He resisted the arguments on the part of the appellants, as to the jurisdiction of this Court; to chide in a case of this kind, as prize, and cited the following cases, *Massett's Decisions*, 3. 143. 247. 6 Rob. 444. 460. 405-6. 440. 448. 461-2. 403. 120. 250-724. 6 T. Rep. 327. Bynk. 23, 24, 25. 3 Vol. 31. Sir J. Justice, 86. 92. 2 Brown's C. L. 349. 1 Marsh. 85. 1 T. Rep. 34. 1 Rob. Rep. 165. 177. 202, 104. 333. 4 Rob. 2. 210. 206. 65. 62. 72. 233. 215. 8 T. Rep. 550. 554, 555. 550. 4 Rob. & P. 343. 4 Blac. Com. 2 Brown's C. L. 331. 3 Rob. 25. 34. 204. 3 Rob. 64. 59. 4 Dall. 298. 302. 1 Binney, 110.

Washington, stopped Mr. Dallas, in that part of his argument in which he was endeavouring to prove, that the cargo was enemies' property; observing that if the cause should turn on that point, he should not decide it without further proof; the evidence to prove the property to belong to the claimant, being very strong, though there was some obscurity in relation to the bill of lading.

After Mr. Dallas had progressed in his argument, and had concluded his observations in respect to the despatches, the Court directed the letter from Mr. Foster to Lord Castlereagh, as he delivered to the agent for the appellees, to be filed in

## The Case of the Tulip.

the cause; observing, that if papers of this kind can properly be kept back by the government or the judge, upon principles of state policy, and their import, as it strikes the judge, be substituted in their room, (as to which no opinion is given or even formed,) in this case, there appears to be no necessity at this time, for withholding them from the counsel for the appellants.

As to the great question in the case, the Court observed, that the sentence of the District Court was approved. There is not a single objection made to the jurisdiction of the Prize Court; and the propriety of a condemnation, on account of a citizen carrying despatches to the enemy, which does not apply with equal force, to a trading with the enemy; and yet, that this is cause of confiscation according to the established maritime law, is established by the decisions of that Court in England, long before the Revolution, and almost as far back as the decisions of that Court can be traced. That Court, considers the property of a subject so engaged, as enemies' property, and the owner, *pro hac vice*, as an enemy. The common law Courts, would treat him personally as a traitor, or as guilty of a misdemeanor, as the case might turn out.

There is no difference as to jurisdiction, or the right of confiscation, between the two cases, except that the offence of carrying despatches to the enemy is most dangerous.

The despatches in question contain information respecting the state of preparation in which the United States were, in respect to our navy; the force of our frigates; the disposition of our government; and contains a recommendation to the British government, as to sending a fleet to the American coast.

*Sentence affirmed.*

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1813.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
          { Supreme Court.  
          { Hon. MICHAEL PETERS, District Judge.

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GILPIN vs. CONSEQUA.

Action on the case on a written contract, by which the defendant, in Canton, agreed to deliver to the plaintiffs' supercargo, for the plaintiffs, a quantity of tea, at certain prices, the same to be fresh, prime, and first class. The breach was, that the teas delivered were not of the quality mentioned, but inferior, &c.

Evidence of conversations, between the supercargo of the plaintiffs' ship, and the defendant, previous to, and leading to the contract, tending to explain or vary it, is improper.

A deposition taken on the direct interrogatories, cannot be read, if the cross interrogatories were not put; and the omission will destroy the deposition, whether it was the act of the commissioners named by either party.

It is no objection to a deposition, that it is written in English, although the commissioners were Dutchmen; and it does not appear, that there was a sworn interpreter, and that the witnesses were examined upon the cross interrogatories, at the time they answered in chief, but answered them afterwards—or that the clerk of the commissioners was not sworn.

This action being for a breach of contract, in not delivering teas of a certain quality, the plaintiffs cannot be permitted to impute fraud to the defendant, by giving evidence tending to show, that after the examination



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of the teas had been purchased as above, it was in the power of the defendant to change them.

The defendant cannot give in evidence against the plaintiffs, a paper sent by Hope and company, at Amsterdam, the plaintiffs' agents, to Fisher, one of the shippers of the cargo; his interest being quite distinct from that of the plaintiffs.

The plaintiffs may examine witnesses to explain, or contradict, evidence which comes out upon the defendant's examination of witnesses; but not, if in the opening, the plaintiffs had given evidence of the same matter, and the evidence he now offers, is not rendered necessary to repel inferences to be drawn from new testimony given by the defendant.

The examination made by the supercargo, of a sample chest, and his having approved of it; do not prevent the claim of the plaintiffs to indemnity, if the teas delivered were not of the quality contracted for.

To ascertain the amount of the indemnity to which the plaintiffs are entitled, for the breach of a contract to deliver teas of a specified quality, the rule is, to consider the sales of the teas at the market where they were disposed of, and compare them with the sales of other teas, not as furnishing the amount, but the rate, of the loss; and to apply this rate to the prices of the articles of the first quality at Canton; and in the absence of other evidence, the prices agreed on in the contract may be taken.

No claim to the supposed loss, by the difference of exchange, can be sustained.

**ACTION** on the case, on a contract made between the supercargo of the plaintiffs, with the defendant, in Canton, in writing, but not under seal; whereby the defendant agreed to deliver to the said supercargo, R. Fisher, a cargo of tea for the Pennsylvania Packet, at certain prices fixed in the contract; the same to be broken, prime, and of the first chop. The breach laid is, that the teas were not of the quality stated in the contract, but were very inferior, &c. Plea, non assumpsit.

The plaintiffs proved, that the Pennsylvania Packet was loaded for Canton, in 1805, with about 80,000 dollars in specie, whereof one-half was shipped by the plaintiffs, on their own account, one-fourth by Durant, and one-fourth by Joshua Fisher; and also, about 14,000 dollars worth of ginseeng. Redwood Fisher and Jasper Reed were constituted the supercar-

goes, and a letter of instructions given to them by the shippers, stating their separate interest; and that the teas to be purchased, were to be marked with the names of the respective shippers, according to their interests, as above mentioned. Mr. Redwood Fisher gave evidence, that upon getting to Canton, he secured the ship with the defendant, and entered into the contract stated in the declaration.

The defendant's counsel, objected to evidence being given of any conversations with the defendant leading to the contract, and tending to explain, or at all to vary it; and cited 5 Vin. 517. 1 Johns. Rep. 414. 453. 5 Idem, 138. 2 Caines, 155. 5 Bos. & Pull. 279. - 12 East, 6.

*By the Court.* Evidence to explain or vary the contract, is improper; all conversations leading to the contract, are merged in it; and if the evidence offered to be given, is only to confirm the contract, (as stated by the plaintiff's counsel,) then, it is improper, because unnecessary; the defendant not meaning, (as his counsel declares,) to impeach it.

The delivery of the teas, and the payment for them, were proved. The cargo was brought to Philadelphia, in August 1806, in good order; and, (except about two hundred and sixteen boxes which were sold,) remained in store till March 1807, when it was sent to Amsterdam, consigned to Hope & Co.; who placed it in the warehouse of the East India Company, who have the exclusive privilege of selling teas. These teas, amongst others in the possession of this company, were sold at public sale, according to the usage, part in August 1807, and the residue in July 1808; of which sales, printed copies were made out of the whole sales (as is usual,) and forwarded to the plaintiffs; from a comparison of which sales, it appeared, that the plaintiffs' teas sold for less than some other teas of the same kind, which one of the witnesses attributed to their being of inferior quality.

The plaintiffs offered in evidence, certain depositions taken under a commission to Amsterdam, which were objected to for

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the following reasons. 1. One of the depositions was taken upon the direct interrogatories of the plaintiffs, but the cross interrogatories were not put to the witness. 2. The depositions are written in English, though the commissioners are Dutchmen; and it does not appear, that there was a sworn interpreter. 3. The cross interrogatories are not put to each witness, after he has answered the direct interrogatories; but after they have been answered by all the witnesses. 4. The commissioners and the clerk were not sworn: as answers to the first objection, it was said; that the not putting the cross interrogatories was the fault of the defendant's commissioner or agent, and therefore, ought not to affect the deposition. *By the Court.* It is a great mistake, to call the commissioner appointed by the defendant, his agent; he is appointed by the Court, though nominated by the party, and is no more the agent of the party nominating him, than an arbitrator is the agent of the party who chooses him. The particular deposition objected to, because the cross interrogatories were not put, cannot be read; but that objection does not apply to the other depositions taken under the commission. There is not the slightest weight in any other of the objections to this commission.

The plaintiffs having offered evidence, calculated to show, that after the examination made by the purchasers of teas, they may be changed, and teas of a different quality imposed upon the purchaser; the Court stated, that this action being upon the contract, no evidence ought to be given, calculated to impute fraud to the defendant. It is not sufficient for the defendant to show, that the teas which were examined by the supercargo, answered the description in the contract, if those which were delivered on board did not. The tea is bound to deliver them of that quality on board, unless the supercargo received them on shore at his risk.

On the part of the defendant, it was proved, that the usage at Canton was for the American merchants to secure with one of the Hopp. That one chest, called the master chest, out of

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each chop, (consisting of a great number of chests of each quality,) was sent to the factory, where the purchaser staid, for his examination. If, after trying it himself, and taking the advice of others on whose judgment he relies, he approved, the whole quantity purchased is sent to the weigh-house, where the chests are weighed and marked; and generally, the next day, it is sent down in one of the *blong* boats to Wampos, about twelve miles from Canton, where the ship is moored. That the purchaser may, if he please, examine every chest of tea, though this is unusual; and he may, if he please, remain with the tea after it is weighed, and accompany it to the ship. Thus the best teas are purchased, from September to the middle of December; and those afterwards purchased are inferior, and not having been selected before January.

The defendant offered in evidence, a paper sent to Joshua Fisher, one of the shippers, and delivered to the defendant by Fisher's executor, containing an account of the sales of the whole cargo of tea sent to Amstterdam, signed by Hope & Co.

*By the Court.* Fisher, Danant, and the plaintiff, were separate, and not joint owners of this cargo; and it is therefore improper to give in evidence, in this case, said account sent by Hope & Co. to Mr. Fisher, although it professes to contain an account of the sales of the entire cargo; the defendant acknowledges, at the time he offers it, that he does not enter to impeach the account of sales from Hope & Co., which has been given in evidence by the plaintiff.

After the defendant had closed his opening, the plaintiff offered to examine witnesses as to the custom spoken of by the defendant's witnesses, in relation to the purchasing of tea at Canton. *By the Court.* In your opening, you examined witnesses on this subject; and as nothing new on that subject has been given in evidence, it would be improper for the plaintiff again to examine witnesses respecting it. The consequence is that he might examine the witnesses, to explain a statement which had come out on the defendant's testimony, respect-

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ing opium, which had been smuggled on shore from the Pennsylvania Packet; and also, to repel an argument, which the defendant's testimony would authorize, being urged, that it was the duty of the plaintiff's supercargo, to have examined for himself, all the teas; and that it was to be presumed, either that he had done so, and was satisfied, or that having neglected to do so, the defendant was not liable. That he meant to prove, that the defendants told the supercargo he need not examine the teas, or, he, the defendant, was bound, by his contract, to deliver him good teas. *By the Court.* As to the affair of the ginseng, the plaintiff have certainly a right to examine witnesses to explain it. They may also repel any argument, to be drawn from the evidence given by the defendant, that the plaintiff's supercargoes either examined the teas, and were satisfied with them, or that they might have done so, and were therefore guilty of a faulty negligence, in not doing so. The evidence offered to be given, is, in this point of view, proper.

The plaintiff contended, in their summing up, that the inferiority of the prices which these teas commanded at the Amsterdam market, to other teas of the same denomination, was conclusive proof, that they were not prime, and of the first class, as stipulated by the contract; and that in ascertaining the quality of these teas, by comparing the prices at which they sold, with those of other teas of the same denomination, the comparison ought to be made with those teas which sold for the highest prices, and not with the average of the whole quantity, say 1000 chests, out of which these few chests were selected. And that in estimating the damages, the plaintiff were entitled to the difference between the sales of their teas, and such highest priced teas, together with the gain by exchange, which they lost upon such difference, had they received it; and also, interest upon the whole.

The defendant insisted, that the supercargoes were satisfied with the said teas, and expressed themselves to their owners; which, under the fair construction of the contract, must shut

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the plaintiffs' mouths upon the subject of quality. That this vessel, having arrived at Canton at the season for the best teas, the contract ought to be construed, in reference to that circumstance, so as to mean such prime, first chop teas, as were to be got at that time.

They insisted, that the sales of a part of the cargo at Philadelphia, with which the plaintiffs were satisfied, because no claim is made on account of that quantity, is conclusive as to the quality of the whole cargo, which the sales at Amsterdam cannot affect. But at all events, the sales of the plaintiffs' teas at Amsterdam, should be compared with the average price of the whole of each denomination; in which case, it would appear, that the plaintiffs had not a pretence of plaint, and that at all events, their claim was unfounded; since it appears, that they made a considerable profit upon the whole voyage.

*WASHINGTON, Justice*, charged the jury. The contract upon which this action is founded, obliges the defendant to deliver to the plaintiffs' supercargo, a certain quantity of teas, of different kinds, at stipulated prices; the same to be fresh, prime, and of the first chop, to their entire satisfaction. The true meaning of the words "prime" and "first chop," (the latter of which seems to have been imported from the east, and to have been incorporated into the mercantile language of this country,) is of course familiar to a jury of merchants, and ought to be better interpreted by them, than by the Court. This being done, it is then admitted by the defendant's counsel, that Consequa was bound to deliver teas of the described quality; but they contend—1. That if the supercargoes were satisfied, (which they expressed themselves in their letters to the plaintiffs to be, by stating that the cargo was composed of teas of the first quality,) that the plaintiffs cannot afterwards object to the quality, in an action upon the contract; and—2. That these words, as descriptive of the quality, should be construed in accordance to the season of the year, and the state of the market.

The Court cannot mention either of these arguments. As to the first, it is most obvious, from the usage of this trade at Canton, as given in evidence, the purchaser never examines all the teas with which he is to be furnished, and seldom more than the register chest, which is sent to him for that purpose; relying upon the Hong merchant, that the quality of the entire parcel of each denomination, will correspond with the sample sent. Besides, if the satisfaction of the purchaser, either expressed or implied, can dispense with the necessity of the tea answering the quality stipulated in the contract, his dissatisfaction, however suspicious and unaccountable, might prevent the seller from fulfilling his contract. The real meaning of the contract is, that the teas shall be of the agreed quality, such as the purchaser ought, upon examination, to be satisfied with. The declarations of the supercargoes, that the cargo was of the first quality, made, as they were in this case, without examination, could only have been upon the faith of the contract, and the honour and judgment of the defendant. 2. The quality of the teas engaged to be delivered, should certainly be considered in reference to the general market of Canton, so as to preclude a construction, which would compel the defendant to deliver teas not usually brought there for exportation. But, if the advanced season of the market should be admitted to control the general and strong expression of the contract, it would be difficult to know where to stop; and such a construction might sanction the delivery of inferior teas, in the face of the contract, which stipulates for those of prime quality. The defendant ought to have known, whether from this or any other circumstance, he could, or could not, comply strictly with his engagement; and consequently, he ought, in the latter case, to have qualified the expressions used.

The true meaning of the contract being ascertained, the next question is, whether it has been broken?

There were two modes, by which the quality of these teas could be tested; examination by competent judges; and com-

by persons who are  
highly competent to  
testify. The plaintiff  
admits, it may furnish  
not always to be  
always a decided test.  
It sometimes happens  
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defendant's rule is also wrong; because it would result, in comparing teas which ought to be of the first quality, with those of inferior teas, so far as inferior teas compose the quantity from which the average is taken, and such teas must necessarily form a part of the average, if price be the test of quality. Some rule, between these extremes, may be more likely to meet the justice of the case, which the jury may probably devise.

Supposing, now, that the jury has settled all the above points to their satisfaction; that is, that this contract has been fulfilled, as proved by the sales at Philadelphia—or not fulfilled, as proved by the Amsterdam sales; and in this latter case, that the teas in question, ought to be compared with the highest sales, or with the average price, or with some price between these extremes—the important question remains—What ought to be the rule, by which damages should be assessed? The plaintiffs claim the difference between the prices of their teas, and the highest sales of other teas at the same time. Besides the objection to this mode, before noticed, there is another, which is, that this would be to subject the defendant to the casualties of a foreign market, with which he has nothing to do. The decisions upon this point, in cases of insurance, have a strong bearing on the question. In that, the insured, if the foreign market be high, may, with at least a semblance of reason, say to the underwriter, “you promised to indemnify me against all loss, arising from certain risks in this voyage; and my loss is precisely the amount for which the cargo would have sold, had it arrived safe;” and the underwriter might use the same language, in case the market were low. Yet the decisions are, that the underwriter is not to be governed by the foreign market. But in this case, the contract of the defendant was merely to deliver, at Canton, teas of a certain quality. It was nothing to him what the plaintiffs did with them, at what market, or at what time they might choose to sell them. It would be most unreasonable, to hold the defendant bound to make up losses which

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might arise out of the speculations or miscalculations of the plaintiffs, to which he was not privy, and in no respect consented. If a man contract to deliver a quantity of flour, for instance, by a particular day, and fails, or delivers it of a quality inferior to that stipulated for; all that can be claimed from him in the first case is, the price of such flour, at the time and place when and where it was to have been delivered, or to make up the difference in the quality. He would never be permitted to resort to a foreign market, to which he might have carried it, to fix the standard of his loss.

Upon this principle, therefore, the jury will consider the sales at Amsterdam, and the comparison of them with those of other teas, not as furnishing the *amount*, but the *rate*, of loss; and having ascertained that, whether it be 5, 10, or any other rate per cent., then to apply that rate to the prices of the same articles of first quality, at Canton, where these teas were delivered; of which, in the absence of other evidence, the prices agreed upon in this contract, may be taken. The result of this operation, will furnish the proper rule of damages, should you give any.

The claim of the plaintiffs, for the supposed loss of what they might have gained by the difference of exchange upon the amount to which you may think them entitled, is too extravagant to be treated seriously. They might as well claim all the profit which might have been made, by investing that money in a cargo of goods, in England, and then selling them in the United States, and so on. As to interest, this is a question generally in the discretion of a jury. But it is not agreeable to legal principles, to allow interest on unliquidated and contested claims, sounding so much in damages.

*Verdict for 5556 dollars.* The claim was upwards of 22,000 dollars.

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The United States vs. Ormsby.

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## THE UNITED STATES vs. ORMSBY.

The defendant settled his account at the Treasury Department, in 1808, on which a balance was stated against him. In 1812, he claimed further credits, which were allowed to him, and which reduced the balance claimed from him in 1808. The Court instructed the jury to allow interest on the actual balance, from 1808.

**ACTION** on the case, for the balance of an account, settled at the Treasury Department. The defendant, under a special contract with the government, to furnish certain supplies to the army, received advances of money; and upon a settlement of his account at the Treasury, in May 1808, a balance of about 2200 dollars was found to be due from him. He afterwards, viz. in March 1812, claimed other credits, which had not been allowed in May 1808, but to which the Treasury Department, in March 1812, was satisfied he was entitled; and being then admitted, reduced the balance to 1616 dollars. The only question was, whether the United States were entitled to interest on the 1616 dollars, from May 1808, or from March 1812.

*WASHINGTON, Justice*, delivered the opinion of the Court. Interest ought to be given from the first named period; and cannot be affected by the subsequent allowance of a credit not known, nor perhaps proved, when the first settlement was made.

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Park vs. Little et al.

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PARK vs. LITTLE & WOOD.

Action for an infringement of the plaintiff's patent-right to alarm-bells for fire engines. The defendants opposed the claim, because the plaintiff had given the use of his invention to the Philadelphia fire company—that the invention is not an alarm-bell, as mentioned in the patent, nor a hose or fire engine—that their bells differ in principle with the plaintiff's.

The plaintiff, not having assigned the whole of his title and interest in the invention, and no deed of assignment being recorded in the office of the Secretary of State, may recover, notwithstanding any agreement to assign. The question, whether the invention is new, will be decided, not by the fact that bells are not new, but whether the mode of ringing them, by the motion of the engine, and not by manual action, is new.

The thing for which the patent is granted should be truly and fully described in the specification. The matters not disclosed must appear to have been concealed for the purpose of deceiving the public.

If an invention is an improvement in *the principle* of a machine for which a patent has been granted, it is not a violation of the patent—if it is an improvement in the *form*, it is such a violation.

**ACTION** for the violation of the plaintiff's patent-right to alarm-bells for fire engines.

The specification states the bell to be attached to a horizontal piece of iron, fixed into an upright elastic piece, the vibrations of which are regulated by a ball of four or five pounds on the top—the whole frame being fastened on the engine, and the bell made to ring by the motion of the wheels on which the engine is fixed. These bells were used on the Philadelphia fire hose engine, for whose use the plaintiff particularly intended it, for the purpose of informing the members, at night, where to find it. The defendants, being members of another hose company, erected on that engine a frame somewhat like gate-posts, with a post across, to which were suspended two bells,

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attached, like the house-bells, to a circular elastic spring. This is the alleged violation.

The objections to the plaintiff's recovery were—1. That his counsel stated, in the opening, that plaintiff had given the use of his invention to the Philadelphia fire company. 2. That this is neither a new nor a useful invention. 3. That it is called, in the patent, an alarm-bell for a fire engine; whereas, it is not intended to give an alarm, but merely to distinguish the members of the Philadelphia company from other companies; and that a hose engine is not a fire engine. Some other objections were made to the specification. 4. That the bells used by the defendants are on an entirely different principle from those of the plaintiff.

*WASHINGTON, Justice*, charged the jury. First point: The plaintiff is entitled to recover at law, no matter what private agreement subsists between him and any other person or persons, unless he has made a legal assignment and transfer of his interest in the invention: now, in this case, it does not appear that such an assignment has been made.

2. Whether this is a new and useful invention, you must decide. But the question is not, whether bells to give alarm or notice are new, but whether the use and application of them to fire engines, to be rung, not by manual action, but by the motion of the carriage, for the purpose of alarm or notice, is a new invention, or improvement of an old one? The power of steam is not new, and yet its application for propelling boats would be considered as such. Nevertheless, you must decide, on the evidence, whether the application of these bells to fire engines is new. As to the question of its utility, it is proved that the plaintiff has received fifty dollars from one fire company in Baltimore, for the privilege of using his invention; and the fire insurance companies of this city, by voting sums of money to the Philadelphia fire company, on account of their using them, is some evidence of their opinion.

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3. This is called, in the patent, an alarm-bell; and so it certainly is, so far as it may give notice of a fire to the inhabitants, and to the members of the company of the engine to which they belong. A hose engine may as properly be called a fire engine, as any other used for extinguishing fire. It is true, that the thing for which the patent is granted should be truly and fully described in the specification; but if this is done, so as clearly to distinguish it from all other things before known, and so as to enable any person skilled in the art of which it is a branch, or with which it is most nearly connected, to make and use the same, it is sufficient—the matters not disclosed must appear to have been concealed for the purpose of deceiving the public, to invalidate the patent.

4. The last question is, have the defendants, by the devising or using their bells, violated the plaintiff's right? The inquiries under this head are—1st. Are the defendants' bells, as used by them, an improvement of the plaintiff's? You have seen and tried both, and can decide. 2d. Is it an improvement in the principle or in the form? If the former, then it is no invasion of the plaintiff's privilege—if the latter, it is.

*Verdict for defendants.*

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Jones vs. Bache.

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## JONES vs. BACHE.

Debt on bond, conditioned for the delivery of a good and lawful title to land in Virginia; to which the defendant pleaded performance.

The surveyors of the county, who officially know that certain lands are covered with prior surveys, are competent witnesses to prove the same.

A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys.

An entry and survey do not, in Virginia, convey the legal estate in lands out of the commonwealth.

**ACTION** on a bond, dated 23d April 1796, with condition that the defendant should procure, within eighteen months, and deliver to the plaintiff, a good and lawful grant from the state of Virginia, free and clear of all disputes and encumbrances whatsoever, for 1000 acres of land in Virginia, described in the condition.

Upon oyer, the defendant pleaded performance, generally. Replication, that the defendant has not procured and delivered a good and lawful patent, free and clear of all disputes and encumbrances; that true it is, he did deliver a patent, but he says that the legal title to the land was not in Virginia at the time it issued, but was vested in one H. B. by treasury warrants, on which surveys were duly made and returned, and thereupon patents were granted to the said H. B. prior to the patent made to the plaintiff. Rejoinder, that the legal title was not in H. B. when the patent to the plaintiff was issued, and that no patent had issued to H. B. prior thereto. On this rejoinder, issue was taken.

The plaintiff gave in evidence a patent issued to him as assignee of the defendant, for 1000 acres, dated 7th July 1797, by metes and bounds; and then proved, by depositions, that this

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land was entirely covered by the prior entries and surveys of H. B. in the pleadings mentioned. The witnesses are the surveyor and deputy surveyor of the county in which the land lies; who annex to their depositions a connected map of the surveys of H. B. recorded in their office, to show the position of his lands, and that they cover the land granted to the plaintiff; and add, that they believe that patents had issued to H. B. or others, for those lands.

This testimony was objected to. *By the Court.* The witnesses profess to speak from their own knowledge of these lands, in their capacity of surveyors, as well as officially as to surveys recorded in their office; and they annex a connected map of certain surveys so recorded, to show the situation of the land; and they swear that the land contained in this map, covers the land in question. This is certainly good evidence, without producing the separate surveys, which could of themselves afford no information. Their belief as to patents having issued, is not evidence; as the patents should be produced.

The plaintiff having closed his evidence, the defendant moved for a nonsuit, the matter in issue not being proved.

*WASHINGTON, Justice.* The material matter for the plaintiff to have averred in his replication, was, that a good and lawful title, clear of all difficulties and encumbrances, had not been made to him—which he could have supported by the evidence. But the replication unnecessarily alleges, that the legal estate was in H. B., and that patents had issued to him; which averments, the defendant, by his rejoinder, has selected to form the subject of the issue; and issue is accordingly taken on them. But the evidence is against the plaintiff; for there is no proof that patents have ever issued to H. B. or any other; and an entry and survey do not pass the legal estate out of the commonwealth, according to the laws of Virginia.

*The plaintiff suffered a nonsuit.*



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Wood vs. Pleasants, President of the United States Insurance Co.

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**WOOD vs. PLEASANTS, PRESIDENT OF THE UNITED STATES  
INSURANCE COMPANY.**

An insurance was effected on the cargo of the *Actress*, from New-York to New-Orleans; and after she passed Havana, she returned to that port, on the plea of a deficiency of water, when, by order of the government, the cargo was landed and put into the custom-house stores; the vessel not being permitted to depart with her cargo. The American consul sold the cargo; and the plaintiff claimed, in this suit, to recover the amount of the loss sustained by the sale.

The certificate of the Collector of Havana, under the seal of his office, of the arrival of the vessel at that place for water, and that before permission to take it on board was given to the captain, he was obliged to stipulate that the cargo should be landed, the articles composing it being wanted for the use of the place—is not evidence, as the deposition of the Collector to these facts should have been taken.

If the necessity produced by the want of water really and fairly existed, a sufficiency for the voyage having been taken on board at New-York, and Havana was the nearest port—a deviation was justifiable.

**ACTION** on an open policy, dated 19th July 1808, on the cargo of the ship *Actress*, at and from New-York to New-Orleans; 4000 dollars subscribed; warranted American property. The plaintiff proved the neutrality of the ship and cargo, and the plaintiff's property in the same; that she sailed on the voyage insured, July 17th, with a sufficiency of provisions, and about 900 gallons of water, and in all respects well found. She passed the Moro Castle, in Havana, on the 9th of August, and had reached the 25th degree of north latitude, in the course to New-Orleans, on the 19th; when it was discovered that the water of one cask had entirely leaked out, and so much of the other as to leave only 30 gallons remaining. In this situation; the captain, after a consultation with his officers and crew, determined to return to Havana, in order to obtain a supply of

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Wood *vs.* Pleasants, President of the United States Insurance Co.

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water; the distance to that place being shorter than to New-Orleans, and the voyage more easily to be accomplished, on account of the current setting to the southward, and the wind being more favourable. They arrived at Havana on the 28th of August, when only two gallons of water remained. The next day, a government boat boarded the ship, and left an officer on board, who ordered the ship into harbour to be moored, declaring that she would not be permitted to sail, without discharging her cargo. The cargo was accordingly landed, by the orders of this officer, and placed in the warehouse of the custom-house, on the 5th of October. The cargo was sold by the American Consul, and the proceeds remitted to the plaintiff, leaving a loss, which is claimed in this suit. In order to introduce a certificate of the Collector-General of the customs at Havana, under the seal of his office, a deposition was read, proving the seal and signature of this officer; that such certificate is a document usually granted at his office; that no other seal is used to certify his acts, than the one affixed to this certificate; and that no other officer is authorized to grant such certificates.

The certificate states the arrival of this ship at Havana, for the purpose of watering, which was granted by the governor; but that to carry this into effect, the captain was obliged to present himself to the Intendant-General of the Royal Armies and Treasury, by whom not only the unloading, but also the sale of the whole cargo was decreed, on the 1st of October, on account of the market being in want of the articles of which it consisted.

This certificate was objected to, by Binney, for the defendant, because the decree itself should be produced, certified by an officer having authority to authenticate it; this certificate and seal, not relating to any acts of the officer giving it, but to those of a different department, those of the Intendant.

*By the Court.* All that we know respecting this certificate is, that the officer who gave it, is authorized, and can alone

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grant such a one, according to the laws which prevail in the island of Cuba. But are we bound, on that account, to receive it as evidence? We admit, that it is an authentic instrument; but still, it is only an *ex parte* certificate of a fact, which the officer who gave it, was authorized to certify. But it is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examining, particularly for the purpose of eliciting the true cause of the order of sale.

*Washington, Justice*, added, that although a witness had been examined to prove, that the Spanish verb, which in this certificate is translated "decreed," means also, "ordered, resolved, determined," and does not necessarily imply that it was in writing; yet, that the decrees of every civilized nation, in relation to the disposition or sale of property, must be presumed to be in writing, unless the contrary appears. If, however, it was proved, that this particular decree, or that the decrees of the government generally, in relation to American cargoes carried to Havana during the embargo, were not in writing, evidence of the purport of those decrees or orders, taken in a proper manner, might be received; or, if it appeared that the officer who gave this certificate, would not be permitted by the government, at Havana, to give a deposition, inferior evidence, in that case, would be received; but no such proof is made in this case. *Peters, Justice*, gave no opinion on this last point, and doubted whether the Court ought to presume, that the decree was in writing. The certificate was rejected.

*WASHINGTON, Justice*, charged the jury. The plaintiff having committed an acknowledged deviation, by returning to Havana instead of pursuing his voyage to New-Orleans, he cannot expect to recover, in this action, without satisfying you by clear and unexceptionable evidence, that he had a justifiable

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cause for departing from the regular course of the voyage insured.

If the necessity produced by the want of water, which is stated by the mate, really and fairly existed, a sufficiency for the voyage having been taken in at New-York—if there was not enough remaining, to supply the wants of the crew to New-Orleans, and Havana was the nearest port, or one which could be most easily gained, at which water could be obtained, then, the deviation was excusable. But, it appears extremely difficult to account for the deficiency in this article, which occasioned the return of the vessel to Havana. The mate says, that the daily expenditure did not exceed five gallons, which, in thirty days, would amount to not more than about one-sixth of the quantity said to have been taken in at New-York; and adding to that the quantity which is proved to have been lost by leakage, more than one-half ought to have remained at the time when the deviation took place. Whether this quantity also leaked out, leaving only thirty gallons, or was unfairly disposed of, you must decide from all the circumstances of the case. But suppose the excuse for the return to Havana, sufficiently made out, still, it was the duty of the insured to pursue the voyage to New-Orleans, as soon as a supply of water was obtained at Havana, if it was in his power to do so. The mate has stated, that soon after the vessel arrived at that place, she was ordered into the port, and a custom-house officer was put on board, who said that the vessel would not be permitted to depart, without landing and disposing of her cargo. That the captain complained to the officer of his detention, and that the cargo was landed by the custom-house officers. But, it by no means appears, that the detention, the landing, and the sale of the cargo, were by the orders of the government, or that the captain applied for leave to depart, and was prevented. Such evidence, (for aught that appears to the Court,) might have been obtained; and as it behooves the plaintiff to give you entire satisfaction that the stay at Havana was

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compulsory, it is for you to decide, whether this is afforded by the testimony of the mate. It is proved that this cargo, which consisted principally of paper, with some other articles, such as capers, olives, anchovies, vermicelli, raisins, almonds, soap, claret wine, butter, and boards, was equally well fitted for the New-Orleans and the Havana markets. Of course, this circumstance is entitled to some weight, in repelling a suspicion, that a deviation was originally contemplated by the owner. But, at the same time, it is not easy to discover any strong temptation in the Spanish government, to violate the rights of hospitality, due to a friendly nation, by detaining such a cargo; and this circumstance strengthens the claim of the defendants upon the insured, to make out this part of his case by unexceptionable evidence.

*Verdict for defendants.*

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M'Murtrie vs. Jones.

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**M'MURTRE vs. JONES.**

Action upon a promissory note, endorsed by the defendant to the plaintiff.

On the day the note became due, it was protested, and notice of its non-payment was left at the boarding-house of Mrs. H., where the defendant was reported to reside. At the time of the drawing of the note, and for some time afterwards, the defendant continued to reside at Mrs. H.'s; but before it became due, he went to New-York, without the knowledge of the plaintiff, and embarked for Europe. The notice left at Mrs. H.'s, was, under all the circumstances, sufficient.

Generally, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used.

**ACTION** against the defendant, as endorser of a note of hand made by William Longstreth, 20th of October 1806, payable six months after date; and assigned by the defendant to the plaintiff, before it became due. On the 23d of April, 1807, the note was protested for non-payment, of which, notice in due form, was left for the defendant, at Mrs. Hand's, in Philadelphia, the reputed place of residence of the defendant, as stated in the deposition of the clerk of the notary, who left it; and who says, that this was done according to the usage and custom of merchants of Philadelphia.

Evidence was given, by a witness, that the defendant did lodge at Mrs. Hand's whilst he was in Philadelphia, until the time he left the city, which was some weeks before the note became due, when he went to New-York to embark for England. It appeared, that the defendant acted, whilst in this country, as the agent of a house in England, though he did some business for himself, and that this note was given for goods belonging to that house, and assigned to the plaintiff in part payment for a bill of exchange. That the defendant, whilst he

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had lodgings here, frequently went to the eastern states on business. When the note became due, part of it was paid by the maker, who, at the same time, passed to the agent of the plaintiff, the note of one Isaac Jones, as a collateral security, on account of this note. Isaac Jones became insolvent before his note was due; and Longstreth, the day after his became due. One of the jurymen was examined, who thought it was the custom to leave a notice at the last usual place of abode of the endorser, but did not recollect any case exactly like the present.

M. Levy, for the defendant, insisted—1. That notice of non-payment by the maker of a note, must be given, and that this was not a good notice. It should have been sent to the defendant, as he had left Philadelphia, which, by inquiry, the plaintiff might have found out. 2. That the defendant acted as the agent of a foreign house, in this business, and is not liable personally. 3. That the note of Isaac Jones should be considered as a payment, it not appearing that the plaintiff had used due diligence to recover it. On the first point, he cited 2 W. Blac. 747. 2 H. Blac. 669. 1 T. Rep. 168. 1 Johns. Rep. 294. On the same point, Tilghman, for the plaintiff, cited Chitty, 89.

*WASHINGTON, Justice*, charged the jury. There is no weight in two of the objections made to the plaintiff's recovery. It is of no consequence, whether this note was made in consideration of goods sold to the maker by the defendant, as the agent of Bowerbank & Co., or on his own account; or whether the endorsement was made upon a consideration, in fact, passing from that house. If the defendant acted as the agent of that company, this circumstance might make that company liable, if they were the defendants; but still, the defendant is liable on his endorsement. So, in respect to the note of Isaac Jones, which was passed to the plaintiff by the maker of this note, as a collateral security;—no laches are imputable to the plaintiff, in respect to that note; it being proved, that the

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maker became insolvent before it became due; and this note is in Court ready to be delivered to the defendant.

As to the question of notice, there is more difficulty. At the time the assignment was made to the plaintiff, the defendant resided in Philadelphia, as a boarder, at Mrs. Hand's. A few weeks before the note became due, the defendant left Mrs. Hand's and went to New-York, with an intention to embark for England, which he carried into execution. This was known to Longstreth, but it does not appear that it was known to Mrs. Hand, to the plaintiff, or his agent Mr. Craig, or to any one else; and it is worthy of remark, that it is proved, that before this final removal, he was frequently absent from this city upon visits to the eastern states. Generally speaking, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used, of which you are the proper judges. But under all the circumstances of this case, it appears to the Court, that the notice left at the known place of residence of the defendant, before his final departure, was sufficient. The Court give no opinion respecting the custom which has been mentioned, and respecting which some evidence has been given, as it does not appear to be sufficiently proved.

*Verdict for plaintiff.*



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The United States vs. Jones.

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THE UNITED STATES vs. JOHN H. JONES.

The defendant, who was the first lieutenant of an American privateer, the *Revenge*, was indicted for piracy committed upon a Portuguese vessel, and for assaulting the Portuguese captain and the crew, and putting them in bodily fear, &c. The defendant was charged with boarding the vessel, and by force and intimidation, taking from her money and other articles, not claiming the vessel as prize, but pretending that the *Revenge* was an English vessel, and that the articles would be paid for, by an order on the English Consul.

The 6th Section of the Act of Congress, makes murder and robbery on the high seas, acts of piracy. The words "which is committed in the body of a county," do not relate to "murder" and "robbery," but to the words immediately preceding them, "or any other offence."

To define the meaning of the term "robbery," the Common Law must be resorted to. Whenever a statute of the United States uses a technical term, which is known, and its meaning clearly ascertained by the Common or Civil Law, from one or other of which it is obviously borrowed, it is proper to refer to the source from which it is taken, for its meaning. The Act of Congress of 26th June 1812, does not repeal the provisions of the law relating to piracy.

Robbery is the felonious taking of goods from the person of another, or, in his presence, by violence, or by putting him in fear, and against his will.

The general rule of law, that robbery on the high seas is piracy, has no exception or qualification in favour of commissioned privateers, in any Act of Congress, in the Common Law, or in the law of nations.

The law for the better government of the navy, which enjoins on inferior officers and privateers, the duty of obedience to their superiors, speaks of the lawful orders of the superiors.

If many go to do an unlawful act, and one only do it, all are principals. But, if they go to do a lawful act, as to visit a vessel to ascertain her character, and all but one commit a felony, though in his presence, but without his participation, his crime is not imputable to him.

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Although the usual evidences of property in a vessel, are the register and bill of sale, if there be such papers, and in the cargo, the invoice, bills of lading, &c., yet, that other evidence may be admitted.

A party cannot discredit his own witness, by proving, that on a former occasion, he swore differently from what he has now sworn.

*Quere*, Whether, under some circumstances, there be an exception to this rule.

**T**HE prisoner was indicted for feloniously and physically entering a certain Portuguese brig, (by name,) and assaulting the captain, &c., putting them in bodily fear, and feloniously, &c., stealing, &c., out of said brig, and from the possession of said captain and mariners, certain enumerated articles.

It appeared in evidence, on the part of the prosecution, that the defendant, was the first lieutenant of a privateer schooner, called the *Revenge*, William Butler master, duly commissioned by the President of the United States, on the 12th of October 1812. It was proved, by the captain, and a third lieutenant of the Portuguese brig, called the *Triumph of Mars*, that he sailed in the said brig from Lisbon, on the 16th of September last, bound to New-York, the vessel, and cargo, on board, belonging to a Portuguese subject, residing at Lisbon. That on the 2d of November, she was chased and brought to by this privateer. That the prisoner, with four seamen, boarded her and called for her papers, which were exhibited, and examined by the prisoner. They were the royal register, the certificate of the American Consul at Lisbon, the invoices and bills of lading. The prisoner then loaded his pistols, presented one of them to the breast of the captain, and informed him that he was a prisoner. The captain was then ordered to open his trunks, and those of his officers, from which, and from the locker of the vessel, he took out fifty dollars belonging to one of the officers; seventy-five half joes belonging to the owners for the use of the vessel; one hundred and eighty dollars belonging to the captain; and eighty-four dollars belonging to one of the officers and a seaman. A general plunder then commenced; and a

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quantity of sugar, cabin furniture, the clothes of the people, rigging, and a variety of other articles, were seized and carried off to the privateer, the prisoner being present the whole time, and directing what was done. All this was done in the presence of the captain and officers of the brig, who supposed the privateer to be French, although, during the whole transaction, she had English colours flying. The witnesses were positive as to the identity of the prisoner. No seizure of the vessel, as prize, was made or intimated; but on the contrary, the prisoner said that he would send an officer to the English Consul, to pay for the articles taken. This was said after the articles were taken, and in answer to the captain's complaint, that he should be so treated by an English privateer. After the last boat load of the plunder was carried away, the captain of the Portuguese brig was ordered, as soon as the privateer should fire a gun, to hoist sail and pursue his voyage. This was done, as soon as the prisoner got on the privateer; and the brig proceeded to New-York, where she arrived on the 16th of December.

The defendant's counsel objected to any evidence being given of the property in the brig and cargo, but the written documents, such as the register, or bill of sale, invoices and the like.

*Washington, Justice.* The usual evidence of property in a vessel is, the registry and bill of sale, if there be such papers; and of the cargo, the invoice, bill of lading, bill of sales, &c. But this is not the only evidence, nor is it always the best. It does not appear, that there was any registry or bill of sale of this vessel; and although there were invoices, and a bill of lading of the cargo, yet, other evidence of property may be given; such as acts of ownership and the like. The Portuguese captain proves, that this vessel and cargo belonged to a Portuguese subject, who put the cargo on board, and employed him and the crew to navigate the vessel. This is sufficient.

On the part of the prisoner, it was proved by four witnesses, two of whom, viz. Le Brun and Whitford, were called and examined.

The prisoner boarded  
 the purpose of inquiry  
 of the Portuguese  
 his men from even  
 sugar from one of  
 to death any of his  
 side from the brig,  
 after examining the  
 brig about half an  
 hour; and after hav-  
 ing complained of be-  
 ing fast, or being intoxi-  
 cated, he laid himself down  
 and after the ves-  
 sel had departed, that the prisoner  
 said, that they saw of  
 after Jones returned  
 when Butler ordered  
 him from her what  
 name of Hancock,  
 resembling him in  
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 men, went in the boat  
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such laws; and the 8th section of the law for the punishment of crimes, which defines piracy, declares these offences committed at sea, to amount to felony and piracy, which, if committed on land, would be punished with death. If the offence is not defined and made punishable by some Act of Congress, neither the law of nations nor the Common Law can be resorted to—and that it is not defined in this law.

2. That if robbery on the high seas amounts to felony and piracy under the 8th section of the above law, it is virtually repeated by subsequent laws in relation to persons acting under a commission of marque and reprisal—these laws having declared a milder punishment, and a particular mode of trial. 1 Leach, 306. The Act of the 26th June 1812, declares, that all offences committed on board of letters-of-marque, by any officer or seaman, shall be tried and punished in like manner as if committed on board of a public armed vessel; and the trial and punishment are prescribed by the Act for the government of the Navy.

3. Robbery cannot be committed, unless the taking be from the person of the owner—which is not proved in this case, even by the witnesses for the prosecution.

4. Piracy cannot be committed by a person acting under a commission. Daponceau's ed. of Bynck. 127. 138. 2 Azuni, 351. If piracy could be committed by one acting under a commission from the United States, the 9th section of the Act, would have been unnecessary.

5. The prisoner was an inferior officer, and was bound to obey the orders of captain Butler; of course, he cannot be punished for having done so.

Dallas, for the prosecution, insisted, that robbery on the high seas is declared by the Act of Congress to be felony and piracy, and that the definition of robbery is to be sought in the Common Law;—that it amounts to piracy; both by the law of nations and the Common Law of England, though committed by persons acting under a letter-of-marque, if it be done feloniously.

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by, as in this case. 2 Woodeson, 422. 1 Leadbe Jenk. 94. 3 Idem, 714. 5 State Trials, 313, 314. Molloy, b. r. c. 2. a. 23. 1 Hawk. 267. 270. 4 Blac. Com. 171. 173. 8 State Trials, 73.

*WASHINGTON Justice*, charged the jury. Although this case will probably be decided upon the evidence, it is of great importance that the questions of law which have been raised, in the able discussion which the case has received, should be settled,—in order that the commanders of our public armed vessels, and more particularly those belonging to commissioned privateers, may know how far their commissions authorize them to go, in relation to neutral vessels which they may meet with at sea.

The offence charged in this indictment, is piracy, by a robbery, committed upon the property of a neutral, met with on the high seas. Before a definition of robbery is attempted, it will be proper to dispose of some preliminary objections, intended to show that robbery on the high seas is not an offence punishable as piracy, by the laws of the United States. It is said, that the defendant is not indicted for piracy, under the law of nations;—that in the Courts of the United States, no indictment at Common Law will lie; and that there is no statute of the United States, which makes this an offence. It is true, that the defendant is not indicted for an offence against the law of nations, or the Common Law; and that, unless the offence charged in this indictment be made punishable by some law of the United States, the prisoner must be acquitted. But nothing can be more clear, than that robbery on the high seas is declared to be felony and piracy, by the 24th section of the Act “for the punishment of certain crimes.”

We understand the argument to be, that as robbery on land is not declared by any Act of Congress to be a capital offence, it is not declared by this section to be piracy, if committed on the high seas. This is by no means the correct construction of the law. Murder and robbery, committed on the high seas, are

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declared to amount to piracy; and also, any other offence, which would be punishable with death, had it been committed on land. It is clear, that the words "which if committed within the body of a county," &c. relate not to "murder or robbery," but to the words immediately preceding, "or any other offence." All that remains, then, under this section, is to ascertain the meaning of the word *robbery*; and it is admitted that the Common Law definition of the term may be resorted to. If a statute of the United States uses a technical term, which is known, and its meaning fully ascertained by the Common or Civil Law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source whence it is taken, for its precise meaning.

2. It is objected, that although robbery on the high seas should be piracy under this statute of the United States, still it is repealed by subsequent laws, which subject the offender to a lighter punishment, and a different mode of trial. The answer to this is, that the 8th and 9th sections of the law for the government of the Navy, which inflicts such punishment upon those who shall take from a vessel captured at sea any part of her cargo, or embezzle the same, or who shall maltreat any of the persons, relates expressly to *prizes*, or to vessels seized as *prize*, and not to acts of piracy; and the Act of June 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. But for piratical acts committed on others, no punishment, or mode of trial by a court martial, is prescribed; and it would be strange if it were, when it is observed that this court martial is to be called upon the application of the captain of the privateer: for, suppose the captain and his crew should commit piracy, by robbery, or by running away with the vessel—he would be the last man to invite an inquiry by a court martial; and yet it is said, that for such an act, he cannot be tried by the proper civil tribunal of the United States. This cannot be the law.

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3. Having disposed of these objections, it will be proper to give the definition of robbery, which is the felonious taking of goods from the person of another, or in his presence, by violence, or by putting him in fear, and against his will. It is objected, that the taking must be *from the person*. The law is otherwise; for if it be in the presence of the owner,—as if by intimidation he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up,—it is robbery; as much as if he has put his hand into the pocket of the owner, and taken money from thence.\* But the taking must be in the presence of the owner.

We have then got so far in the examination of this cause, as to have ascertained that the *felonious* taking of goods from the person of another, or in his presence, on the high seas, by violence, or by putting him in fear, and against his will, is felony and piracy by the law of the United States, and punishable with death.

4. But the taking must be felonious; and it is contended, in behalf of the prisoner, that spoliation of the property of a neutral, on the high seas by a commissioned cruiser, cannot be felonious, and consequently is not piracy,—that the commission is a complete shield to the persons acting under, though in contravention of it, against any species of taking, although the same would amount to robbery, at Common Law, if committed on land. The counsel on each side have directed their principal strength to this part of the case; and its novelty, as well as its importance, has merited the attention which has been bestowed upon the examination of it. But we ask, where do the counsel find this qualification of the general rule, that robbery on the high seas is piracy? Not in the 8th section of the Act of Congress constituting this offence. That section is general in its expressions, and applies to all persons whatsoever committing robbery on the high seas. Not in the law of nations—

\* See 2 East, Crim. Law, 707. 1 Hale, 533. 1 Hawk. c. 34. s. 5.



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for many respectable writers on public law, are express upon the subject, that piracy may be committed by persons acting under a commission to cruise; and there is not a *dictum* of any writer to the contrary, to our recollection. Such is the clear opinion of Sir Leoline Jenkins, supported by Molloy, Woodeson, and by the decision given in Kyd's case, 5 State Trials, 313, 314; which latter case, though decided at Common Law, is clearly bottomed upon the principles of the maritime law of nations, with which the Common Law in this respect agrees. This doctrine is not contradicted by Bynkershoek, who was relied upon by the prisoner's counsel, who merely says,\* that if a commissioned cruiser exceed his authority, he would not, on that account, hold him to be a pirate. Neither is he held to be a pirate, or contended in this argument, by any person, to be a pirate on that account. If such a cruiser capture a neutral vessel, he exceeds his authority; but if he takes her as prize, it is a marine trespass, but not an act of piracy. Yet if the taking be felonious, and with intent to commit a robbery, this writer does not say, that the act would not amount to piracy; and certainly it would be strange, if a commission to do a lawful act, sanctioned by the law of nations, could grant, by implication, impunity against a crime which that law views with abhorrence, and which all civilized nations unite in punishing with the greatest severity.

The counsel, who endeavour to maintain this qualification of the general law of piracy, would not, we presume, turn to the Common Law, in order to find it; and if they were to do so, they would equally be disappointed. Beside the positive decision against it in Kyd's case, there is no analogy to the doctrine, to be met with in the Common Law. If an officer, hav-

\* The words of this learned writer are, "but whether one be a pirate or not, depends upon the fact, whether he has or not, a commission to cruise; and if it should be alleged, that he exceeded the authority which that commission gave him, I would not, on that account, hold him to be a pirate."

ing a warrant against a particular individual, to arrest his person, or to seize his property, should abuse the person of his prisoner or his property, or should take the property of some other person than of him against whom the writ was directed, he would be a trespasser; should he, under cover of such an authority, steal the property, it would be larceny. So, with respect to a commissioned cruiser. If he take the property of a neutral, he is a trespasser, and will be compelled, not only to make restitution, but compensation also, in damages, unless he had probable cause for seizing the property as good prize. And if he should make the seizure, not as prize, but with a felonious intent to convert the property to his own use, without inquiry and trial, what reason can be given, why his commission should shield him from the charge of felony and piracy? In deciding in either case, whether the act amounts to trespass or felony, the *quo animo* is to be sought after, and is to be judged of by the actions of the party. If the doctrine, that a commissioned cruiser cannot commit an act of piracy, is not to be found in the 8th section of the Act of Congress, nor in the Common Law, or law of nations, does it receive any countenance in the provisions of the 9th section of the same Act of Congress? We understand the argument founded upon this section, to be this;—that if a commission granted to a cruiser by *the United States*, does not protect one of its citizens against a charge of piracy, committed upon a neutral and a foreigner, a commission granted by a *foreign nation* to one of our citizens, would not excuse a piratical or hostile act committed against another citizen, or against the United States. The 9th section, therefore, was altogether unnecessary, since, upon the doctrine that the commission in such case makes no difference, the offence described in the 9th section, would be punishable under the general expressions contained in the 8th section. But the legislature, by introducing the former section, has thereby intimated an opinion, that even a commission granted by a foreign nation, much more one grant-

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ed by the United States, would not protect the cruiser against a charge of piracy, for robbery committed upon the high seas, unless the legislature should prescribe a different rule in relation to foreign commissions. Such we understand to be the argument. Let it be remarked, in the first place, that this mode of arriving at the legislative meaning of a law, is not always to be depended upon. The reason which induced the making of the provision, from which the inference is drawn, can only be guessed at. It may be made merely from abundant caution—from inattention to some general principle of law, or of some provision in former laws; or it may be copied from a law found in some other code, without attending to the particular reason, which had induced its adoption into that code. The 9th section of this law, is, in fact, copied from the statute of the 11th and 12th Will. 3. c. 7, the history of which statute is explained by Hawkins. It was aimed at commissions granted to cruisers, by James II., after his abdication; which, by many, were considered as conferring a legal authority to cruise, so as to protect those acting under them against a charge of piracy. Still, we admit, that unless some other reason can be assigned for the introduction of a similar provision into our law, the argument which has been founded upon it, would deserve serious consideration. We do not think it difficult, to assign a very satisfactory reason for the adoption of this section, without viewing it in the light of a legislative construction of the 8th section, or of the general law.

If a citizen of the United States, should commit acts of depredation against any of the citizens of the United States, it might at least have been a question,\* whether he could be guilty of piracy, if he acted under a foreign commission, and *within the scope of his authority*. He might say that he acted under a commission, and not having transgressed the authority derived under it, he could not be charged *criminally*. But the

\* See 2 Brow. Adm. and Civil Law, 461.

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9th section declares, that this shall be no plea; because the authority under which he acted is not allowed to be legitimate. It declares to the person contemplated by this section, that in cases where a commission from his own government would protect him from a charge of piracy, that is; where he acted within the scope of it, or even where he acted fairly, but under a mistake, in transgressing it, yet that a foreign commission should afford him no protection, even although he had not exceeded the authority which it professed to give him. But it by no means follows from this, that a citizen, committing depredations upon foreigners or citizens, not authorized by the commission granted by his own government, and with a felonious intention; should be protected by that commission against a charge of piracy. Another object of this section seems to have been, to declare that acts of hostility, committed by a citizen against the United States, upon the high seas, under pretence of a commission issued by a foreign government; though they might amount to treason, were nevertheless piracy, and to be tried as such.

5. The only remaining question of law which has been raised in this cause is, that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination, and was decided by this Court in the case of General Bright. It is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked, that the 14th section of the law, for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience

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to their superior; cautiously speaks of the *lawful orders* of that superior.

Disobedience of an unlawful order, must not of course be punishable; and a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say, that the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior.

What remains for us to say, as it concerns the evidence only, will be short. The evidence of the two Portuguese witnesses, unless it should in your opinions be overbalanced by that given in favour of the prisoner, makes out fully the case stated in the indictment. The captain, officers, and crew, of a friendly vessel, were, by intimidation, and against their will, forcibly despoiled of their property by the prisoner, taken in their presence and carried away; and all this was done with a felonious intent, if it is possible by the conduct and actions of men to develop their intentions;—that the prisoner did not act under a mistaken opinion, that the property belonged to enemies, is plain; because in that case, it would have been good prize, and the seizure would have been made as prize, and would, and ought to have been, sent in for adjudication. But no attempt of this sort was made. The spoliation was made under false colours; and the illegality of it was acknowledged by the prisoner, when he spoke of payment being made for the property, by the English Consul, at Lisbon. It has not been pretended, that the privateer had not men enough to spare, for the purpose of taking possession of this vessel, and sending her in for adjudication, if it ever was the intention of the captors to consider her as prize. The plundered property was carried to the privateer, and instead of being preserved with a view to future inquiry, it was converted to the use of the spoliators; part of it at least, divided amongst them, and the rest concealed. After their arrival within the United States, instead of instituting

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The United States vs. Jones.

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proceedings for the purpose of condemning the property, a profound silence in relation to it was observed. These circumstances, if sufficiently made out in proof, are sufficient to establish a felonious intent.

Le Brun and Whitford, supported by two other witnesses, all of them belonging to the privateer, confirm the testimony of the Portuguese captain and mate, as to the spoliation. All of them concur in describing a scene of lawless plunder, disgraceful to the national character of our country, and to that flag, which the gallantry of our naval officers and their crews has signalized, and caused to be respected. But, as to the identity of the prisoner, the evidence of the four witnesses belonging to the privateer, is directly opposed to that of the two Portuguese witnesses. They concur in stating that the prisoner first boarded the brig, and that his conduct, during the short time he remained on board of her, was unexceptionable;—that he forbade his men to take away with them the smallest article, threatening them with the most severe punishment, in case of disobedience;—that he returned to the privateer indisposed, and was either asleep, or appeared to be so, during the whole time that the robbery, by the order of captain Butler, was committed. The Portuguese witnesses are positive, as to the identity of the prisoner. But without imputing to these much abused strangers, an intentional deviation from truth, it is possible they may very innocently have mistaken Hancock for the prisoner; as it appears that they strongly resemble each other, in the features of the face and in size. If, indeed, the prisoner's witnesses are believed, the mistake is apparent; because they prove the dress of Hancock to have been precisely that, by which the prisoner is described by the Portuguese witnesses; and that of the prisoner, to have been different in all respects.

To you it belongs, to weigh conflicting evidence, and to judge of the credit of witnesses; and in doing this, you ought

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to throw into the prisoner's scale, the good character, which, previous to this affair, he is proved to have borne.

Should you incline to acquit the prisoner of any active participation in this robbery, he cannot be convicted upon the ground of his being a member of the society which committed the offence. If a number of persons associate to do an unlawful act, and proceed to its execution, it will be no excuse to one of them who was present, that he did not individually do the act—all are principals. But if the thing to be accomplished be lawful, as the visitation of this vessel was, and all but one of the party commit felony, though in the presence of that one, but without his participation; the crime of his companions is not imputable to him. You will now retire, and consider of this case.

*Verdict, not guilty.*

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The United States vs. Jones et al.

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**THE UNITED STATES vs. JONES, PICKLE, AND REESE.**

The humanity of the law, no less than the feelings of the Court, favour the liberation of a prisoner on bail, who is proved to be suffering under a disease, which may be ultimately dangerous, from his being kept in confinement. It is not necessary that the danger from confinement should be either immediate or certain—if the disease is represented, by a skilful physician, to be such as that confinement must be injurious, and may be fatal, it is proper to bail the prisoner.

A bill of indictment being found against a prisoner, the Court will not go into an examination of the evidence, for the purpose of taking bail.

**INDICTMENT** for piracy. The District Attorney, having stated to the Court, that he could not safely try this case at the present Term, on account of the absence of material witnesses, whose attendance at the next Court, steps were taking to procure, directed the case, with the assent of the Court, to be continued.

A motion was now made to admit the prisoners to bail, upon the ground that the continuance was not made by order of the Court, upon a motion for that purpose, founded upon an affidavit of the absence of material witnesses. An additional reason was assigned as to Jones—that his state of health required it. As to Reese, his counsel proposed to go into the evidence against him, to show that he ought to be bailed, because when the subject of bail was under the consideration of the District Judge, the case of this man was not before him.

*WASHINGTON, Justice.* In the exercise of that discretion with which the law invests the Court upon this subject, we should no doubt be greatly influenced to a favourable exercise of it, where the continuance appeared to be capricious and unreasonable on the part of the law officer of the Court. But in



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The United States vs. Jones et al.

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this case, a very sufficient reason for the continuance was assigned by the District Attorney; and though not verified by affidavit, the Court was satisfied, and assented to the continuance. This, therefore, furnishes no good cause for bailing the prisoners. As to Jones, it is proved by the physician who has attended him since February, in jail, that his health is bad, his complaint pulmonary, and that, in his opinion, confinement during the summer might so far increase his disorder as to render it ultimately dangerous. The humanity of our laws, not less than the feelings of the Court, favour the liberation of a prisoner upon bail, under such circumstances. It is not necessary, in our view of the subject, that the danger which may arise from his confinement should be either immediate or certain. If, in the opinion of a skilful physician, the nature of his disorder is such that confinement must be injurious, and may be fatal, we think he ought to be bailed.

As to the case of Reese, it is immaterial, now, whether his case was before the District Judge, or not. The bill of indictment being found, we do not feel ourselves at liberty to inquire into the evidence against him.

Bail for Jones ordered in 10,000 dollars himself, and two sureties, each 5000 dollars.

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 Wilkins vs. Jordan.
 

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## WILKINS vs. JORDAN.

Under special circumstances, as if the defendant in a bill for an injunction be merely nominal, the Court will, on the application of the party really interested, though not a party on the record, direct the answer of the nominal party to be taken under a commission; and notice of such an application to the Court, is not necessary.

Notice of a motion to dissolve an injunction must be given, unless the cause has been set down for dissolution, in a reasonable time before the motion is made.

**T**HE complainant filed a bill in this Court, praying an injunction against a judgment obtained here—which was granted. The defendant forwarded his answer, and afterwards an amended answer, in which he states that he had, long before the institution of the action at law in his name against the complainant, assigned over to one West all his right and title, claim and demand, against the complainant; and that the suits at law were instituted by said West, and carried on at his expense;—that he made also a general assignment of the residue of his property, for the benefit of all his creditors, to whom he delivered over his books, and of course cannot give a distinct answer to many of the allegations in the bill.

Upon an affidavit of West, that these answers are not full and satisfactory, and a suggestion that they had not been fairly taken, a motion was made for a commission to take the defendant's answer.

*WASHINGTON, Justice.* This motion is not objectionable on account of its novelty, as we know that in England, answers taken in the country are always under a *dedimus potestatem* to commissioners. The practice in this country, so far as we are acquainted with it, is otherwise; nor should we like to adopt,

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Wilkins vs. Jordan.

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generally, that which prevails in England. But when the defendant is merely nominal, and has not the means, and probably might not have the inclination, to give as full an answer as the case admits of, and the interest of the party really interested demands, we should think it entirely proper to issue a commission, upon the application of the real party in the cause; particularly when it is considered, that if the answer be insufficient, the complainant alone has the power to except—which he will never do, if the answer suits his purpose. As the plaintiff, if he means nothing but what is fair, (and in this case we see no reason for suspecting the contrary,) cannot possibly be injured by the defendant's answer being taken under a commission, no notice of such a motion is necessary. But the motion to dissolve the injunction in part, cannot be listened to without a previous reasonable notice, either in writing, or by setting it down for that purpose, a sufficient length of time before the motion is made, to allow the complainant to take affidavits to support his bill.

In this case, we shall direct a commission to issue for the reasons before mentioned, and not on account of any alleged impropriety of conduct in the plaintiff or his agents. Were this the only ground for such a motion, we should require notice to the adverse party, that he might be prepared with counter-affidavits, if he thought proper.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1814.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
Hon. RICHARD PETERS, District Judge.

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THE UNITED STATES vs. JONES, PICOLE, AND REESE.

Indictment for piracy committed on a Spanish vessel by the defendants, the first lieutenant and subaltern officers of the American privateer *Revenge*. As there is no proof that in the first instance any unlawful acts were sedited by the commander of the *Revenge* and his officers, it will not be sufficient to prove acts of robbery committed by him and his crew generally—it must be proved that the defendants participated in the taking, and that they did it feloniously.

The jury should be satisfied, if they believe that the defendants participated in the taking of the property from on board the Spanish vessel, that they knew, or might have known, at the time of capture, that robbery, and not capture as prize, was contemplated.

The captain of the *Revenge* may have been guilty of robbery, and those who executed his orders be innocent.

THIS was an indictment against these persons for piracy, committed on the high seas. Jones was the first lieutenant, and the other defendants subaltern officers on board of the *Revenge*, a commissioned privateer, commanded by captain Butler.

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The United States vs. Jones et al.

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It was proved, that during her cruise, in November 1812, she fell in with a Spanish ship on a voyage from Havana to Cadiz, which she had chased for upwards of an hour before she came up with her. The Revenge was under English colours, and the ship under Spanish, as proved on the part of the prosecution--and under English, as stated by some of the prisoners' witnesses. The ship fired two guns to windward, but at such a distance as could not reach the privateer, and which was done, as was proved by one of the mariners of the ship, to induce the privateer to display her real character. When the privateer got near to her, she gave her a broadside, and afterwards a discharge of musketry; and she struck her colours. The witnesses for the prosecution stated that all these acts of hostility were committed under English colours, which was denied by those for the prisoners. The captain of the ship was ordered on board with his papers, and he, together with the crew who accompanied him; were put into irons, and placed on the deck. Jones was ordered to go on board the ship, and examine into her character. It is doubtful, from the evidence, whether it was during the half hour that he remained in the ship, or after he had returned to the privateer, that a bag of dollars was brought by some of the crew of the privateer from the ship to the privateer. Butler, having learned from the Spanish captain that he had more silver on board, he sent information of this discovery to Pickle and these then on board the ship, with directions to search for and send it to the privateer. Eight boxes were accordingly brought to the privateer, containing 2000 dollars each, which, by Butler's orders, were deposited in the cabin. By orders from the same quarter, the persons of the Spanish captain and his crew were searched for valuables; and five doubloons, and a gold watch, were taken from one of them by Butler, and deposited in the cabin. The captain and crew of the Spanish ship were then sent on board their ship, and ordered to make sail; which they did. It was proved, that when Jones returned from the Spanish ship, he reported to the captain that she was Spanish.

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The United States *vs.* Jones et al.

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Two or three days after this transaction, the privateer again overhauled this same ship making for Savannah, with a view, as the captain said, to repair the losses they had sustained in the clothes taken from his crew, by those of the *Revenge*. Butler returned them some of their clothes, and then ordered the Spanish captain to proceed on his voyage, threatening to sink him if he should meet with him again on the American coast; and the better to ensure his departure, he conveyed him from the coast for about two days. Within a day or two after the money was taken from the ship, it was divided amongst the officers and crew, although no direct proof was given, that the prisoners received any part of it. The *Revenge* put into Charleston, where no proceedings were instituted for condemning the property taken from the Spanish ship. Butler was apprehended and tried at Charleston. The prisoners came on to Philadelphia, where they were apprehended.

It was contended, by Rawle and Charles J. Ingersoll, for the prisoners, that robbery, not being defined by any statute of Congress, the Common Law cannot be resorted to in order to prove, that the taking in this case amounted to that offense. It was also contended, that a commissioned privateer cannot commit piracy. Upon the merits, it was argued, that the seizure in the first instance, was for the purpose of examination; and of course, that all the acts of the prisoners were then performed in obedience to the lawful commands of captain Butler, and could not be rendered criminal by the subsequent unlawful conduct of the captain.

WASHINGTON, Justice, charged the jury. All the legal objections urged by the counsel for these prisoners, were examined and decided by the Court, in the case of the United States *vs.* Jones; which was tried twelve months ago; which opinion it will be sufficient to read on this occasion. See ante, p. 209.

We pass on, therefore, to the only question which is at all

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The United States vs. Jones et al.

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important in this case; and that is, whether the felonious intent with which the prisoners are charged to have spoiled the Spanish vessel, is made out by the evidence.

That an act of piracy, never surpassed in atrocity, has been committed in this case, cannot be denied by any person who has heard the evidence. But since there is no proof, that, at the first instance, any unlawful acts were avowed by captain Butler, or meditated by his officers and crew, it will not be sufficient, to prove acts of robbery committed by him and his crew generally; to convict the prisoners, it must not only be proved that they participated in the taking, but that they did it *feloniously*. Whether the first is brought home to all the prisoners, must depend upon the evidence, of which the jury will judge. But should the fact, in your opinion, be sufficiently established, still, you must be satisfied, that the prisoners knew, or ought to have known, at the time they acted, that robbery, and not a seizure as prize, was contemplated by the captain or themselves; and it is in this point of view only, that the orders of captain Butler can, in any manner, afford a shield to those whose duty it was to obey them. For, he may have been guilty of robbery, and those who executed his orders be innocent, or partakers in his guilt, according to the circumstances of the case.

If captain Butler intended to act within the scope of his commission, he had an authority to bring this vessel to, to examine her papers, her officers and crew; and to take as much time as was necessary to enable him to decide ultimately as to her real character, and as to the conduct which it would become him to pursue. If he concluded that the ship and cargo, or the latter, really belonged to the enemy, or that she had been guilty of unneutral conduct, and was of course good prize, it was his duty to put a prize-master on board of her, and to send her in to some port of the United States for adjudication. It was not regular for him to break bulk, and to take any part of the cargo on board the privateer, unless in a case of necessity, as where he had not a sufficient number of

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The United States vs. Jones et al.

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suspected; and the jury may presume, that they acted under an impression from the beginning, that it was not the intention of captain Butler to seize this property as prize. It does not appear, that an intention to make a seizure of this character, was ever declared by Butler. The ordering the Spanish vessel from the coast; the division of the plunder; and the secrecy observed in relation to these transactions by Butler and the prisoners, after they landed at Charleston, without a murmur of disapprobation having at any time been heard to escape from the prisoners to the captain; are all circumstances to be weighed by the jury, to prove a felonious intent in the prisoners, at the time they obeyed the orders of their commander. Should you, gentlemen, be of opinion, that this is the fair inference to be deduced from those circumstances, then the prisoners cannot shield themselves under the orders of their captain; and in that case, your verdict ought to find them guilty. But if you cannot conscientiously make such an inference, then it will be your duty to acquit the prisoners.

*Verdict, not guilty.*

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The United States vs. Jones et al.

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men, to spare as many as might be necessary to bring the prize into port. This was not the case with the *Revenge*. But this irregularity would not, of itself, be sufficient to render the conduct of captain Butler criminal, if he had in other respects shown that his intentions were honest. So far from this, he gave the most complete proof of the intention with which this seizure was made, by dividing the spoil with his crew, ordering the Spanish vessel from the coast, and after he got to Charleston, taking no steps to obtain a condemnation of the property he had seized. This conduct would be sufficient to establish the charge of piracy against Butler; as much so, as if he had declared, in the first instance, that the seizure was not as prize, but with a view to plunder.

But, in relation to those who acted under the orders of Butler, the same inference does not necessarily follow. He had a right to command those persons to visit the Spanish ship, to bring away her papers, and if he pleased to go so far, even to tranship her cargo, and to take from the persons of the crew, whatever valuables might be found on them. These orders were not inconsistent with the act of seizing the property as prize, and at most, could only be considered as equivocal. Unattended by other circumstances, to induce a well-grounded suspicion of the honesty of Butler's intentions, the orders were legal, and the prisoners were bound to obey them. If so, the subsequent evidence which the conduct of Butler afforded of the *quo animo*, with which the seizure was made, cannot be used against these men, to fix the charge of a felonious taking upon them, notwithstanding it was quite sufficient to criminate him, who gave the orders. The prisoners acted very improperly, in accepting any share of the plunder, before it was regularly condemned; but this would not, of itself, afford direct proof, that they executed the orders of their commander, knowing that they were illegal and criminal. It must, at the same time, be admitted, that connecting all the subsequent events with the original taking, the innocence of the prisoners may well be

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suspected; and the jury may presume, that they acted under an impression from the beginning, that it was not the intention of captain Butler to seize this property as prize. It does not appear, that an intention to make a seizure of this character, was ever declared by Butler. The ordering the Spanish vessel from the coast; the division of the plunder; and the secrecy observed in relation to these transactions by Butler and the prisoners, after they landed at Charleston, without a murmur of disapprobation having at any time been heard to escape from the prisoners to the captain; are all circumstances to be weighed by the jury, to prove a felonious intent in the prisoners, at the time they obeyed the orders of their commander. Should you, gentlemen, be of opinion, that this is the fair inference to be deduced from those circumstances, then the prisoners cannot shield themselves under the orders of their captain; and in that case, your verdict ought to find them guilty. But if you cannot conscientiously make such an inference, then it will be your duty to acquit the prisoners.

*Verdict, not guilty.*

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The United States vs. Pryor.

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THE UNITED STATES vs. WILLIAM PRYOR.

Indictment for treason, in adhering to the enemy; charging the defendant, *inter alia*, with going from the British squadron to the state of Delaware, with intention to procure provisions for the squadron.

The going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason; as this conduct rested in intention, which is not punishable by our laws.

*Aliter*, if a person has carried provisions towards the enemy, with intent to supply him, though that intention should be defeated.

If the intention of the defendant had been to procure provisions for the enemy, by uniting with him in hostilities against the citizens of the United States, his progressing towards the shore would have been an overt act of adhering to the enemy, though no other act was committed.

**T**HIS was an indictment for treason. The first four counts, charged the prisoner with adhering to the enemy, giving them aid and comfort; by taking on board at Philadelphia a cargo of provisions, and carrying it to the squadron which blockaded the Delaware, in April 1813. The other counts charged the defendant with the same species of treason, by going from a British seventy-four, whilst lying in Delaware Bay, to the shore of the state of Delaware, with intention to procure provisions for the blockading squadron.

The evidence given in behalf of the prisoner, so completely exonerated him from any treasonable conduct, under the counts which charged him with having adhered to the enemy in this district, that these counts were abandoned by the prosecuting officer, in his summing up to the jury. As to the count charging him with overt acts of treason, committed in Delaware Bay, and on the Delaware shore, the evidence was as follows.—The prisoner, having, on his passage from Philadelphia to New

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The United States vs. Pryor.

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Yank, loaded with flour, been chased by a British vessel of war, and captured, about forty miles to the north of the capes, was consigned, with the prize, to Commodore Boscawen, who then commanded the British squadron in the Delaware bay. He was received on board as a prisoner, where he met, with many of his countrymen in the same unhappy situation. It appeared, that he frequently conversed with his fellow-prisoners upon the subject of attempting their escape; but the difficulties which seemed to attend every plan he proposed, appeared to be insurmountable. At length he inquired of one of the prisoners, if he could conduct him to any part of the Delaware shore, where he could obtain a parcel of bullocks for the use of the ship; and was answered in the affirmative. He then obtained a number of men from the commodore, to accompany him on shore for the purpose of obtaining live stock; and also a flag of truce, which was taken into the vessel which was to carry them to the shore. The men who accompanied him, took their arms and ammunition along with them. When they landed on the Delaware shore, the prisoner who had attended Pryor as guide, descended, whilst affecting to go after a parcel of cattle, some at a distance. The prisoner, together with a British flag bearer, went about two miles into the country, and stopped at a house, where the former endeavoured to purchase some bullocks or other live stock, and urged strongly his request, that the countryman would sell to him, by stating his unhappy situation as a prisoner, separated from his family, who resided in Massachusetts; and that by obtaining the articles which he sought to purchase, it would be in his power to ransom, not only himself, his vessel and cargo, but his fellow-prisoners, from captivity. All his efforts, however, to procure provisions by purchase, proved abortive; and no attempt was made, or hinted at, in the most remote manner, to obtain them by force or intimidation. In the course of that evening, whilst supping at the farmer's house, the militia made their appearance; and the prisoner, with his companion, were seized and sent to the

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The United States vs. Pryor.

plained of the conduct of those who had done so, in coming aboard, whilst they pretended that they had come under the protection of a flag. The latter answered, that they had been sent with a flag, for the purpose of purchasing provisions; and he condemned the officer who commanded the party, for taking arms with him.

Mr. Dallas contended, that though the prisoner failed in his design of obtaining provisions for the enemy, after he landed in Delaware, yet, as his intention was treasonable, his getting into the boat and proceeding to the shore, in order to carry that intent into execution, was an overt act of adhering to the enemy.

But, if not so, his going in hostile array, with a design to use the protection of the flag, only in case of the party being overpowered by the Americans, the proceeding a single step in execution of such an intention, was an overt act. He insisted, that, upon the evidence, it did not appear, that the flag was at any time hoisted. As to the motives attributed to the prisoner for engaging in this unlawful enterprise, viz. the obtaining the means of ransoming himself, or of escaping, they would not, if proved, be sufficient to excuse him from the charge of treason.

WASHINGTON *Justice*, charged the jury. That the prisoner went from the British seventy-four to the shore, with an intention to procure provisions for the use of the enemy, is incontestably proved, and, indeed, is not denied by his counsel. If this constituted the crime of treason, the motives which induced him to attempt the commission of it, and by which there are the strongest reasons to believe he was most sincerely actuated, would certainly palliate the enormity of it. But the law does not constitute such an act treason, even although these motives had not existed; and, although intentions and feelings as disloyal as ever stained the character of the most atrocious traitor, were proved against the prisoner. Can it be seriously

## The United States vs. Pryor.

urged, that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk towards the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention. In such a case, the motives which induced the prisoner to use his exertions to procure provisions, would take from his conduct every possible imputation of disloyalty and disaffection to his country. The intention to procure the means of effecting the liberation of himself and his fellow-prisoners, had it even been carried into execution, would have been an honest and generous one; even although the law should not have excused the act. If the object of the prisoner was to break his parole, after he had got so land, and to escape; it is one which would not meet our approbation. We can never be the apologist of disingenuous conduct, let who will practice it; and we are firmly of opinion, that nations, as well as individuals, will always find their best interest to be promoted by fidelity to their engagements, and by maintaining a disposition, too proud to descend to artifices to deceive even an enemy. But, although, as moralists, we cannot approve of an intention in the prisoner to violate the promise he had plighted to the enemy, yet, as judges, we must pronounce, that by doing so, he would have offended against the law of his country.

But, if the intention of the prisoner was to procure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the District Attorney; then, indeed, it must



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The United States vs. Pryor.

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he admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed. But how stands the evidence as to this fact. The only witness who proves any thing in relation to such an intention, is the black man who was applied to by the prisoner, to conduct him to some place where bullocks might be procured; and he states, that the prisoner told him that the flag was only to be used, in case it should be necessary to shield the party against superior numbers. Now, this is so highly improbable, that it is fair to conclude, that the witness must have misunderstood what the prisoner said to him. The prisoner could not have been ignorant of what every person must know, that no officer, in any army, would dare to violate a flag of truce, by attempting, under any circumstances, to use it as a cover for acts of hostility. No officer would expose himself to the punishment which the laws of war would compel his superiors to inflict upon him, and which it would be their interest not to disregard, if they meant, on any future occasion, to claim the immunities annexed to a flag of truce.

But it is denied, that this vessel, during her passage to the shore, or during her stay near to it, hoisted the flag, or appeared to seek its protection. The evidence of the same black man to this effect, is flatly contradicted by the pilot, who was on board during the whole time; and who declares, that it was flying at the mast-head during her passage to, at, and from the shore; and that many American vessels, which passed her, and who might otherwise have been seized as good prize, were suffered to proceed without inquiry or molestation. In short, during the whole time that this party was absent from the ship of war, all was peace with them. But what seems almost to conclude this point, is the official declaration of Commodore Beresford to the governor of Delaware, that this vessel went to the shore under the protection of a flag, with a view to purchase provisions. Now, this evidence is not to be discredited by saying that it proceeded from an enemy; because, all ci-

## The United States vs. Fryer.

civilized nations are bound to give credit to the official declarations of the commander of the enemies' forces. There is no American, who would not feel a just indignation, if a British officer should venture to question the veracity of an American commanding officer, in relation to a fact which he stated officially as being within his own knowledge. There is no doubt, that accompanying the flag by armed men, was an irregularity; and Commodore Bessard very properly censures the officer who commanded the party, for carrying arms. Nevertheless, no act of hostility was attempted, nor is there the slightest reason to believe, that any was mediated by the prisoner, or by any of the party.

Upon the whole, it is the opinion of the Court, gentlemen, that the undertaking of the defendant to procure provisions from the shore, for the use of the enemy, and his proceeding to the shore with this intent, as laid in the eighth and ninth counts in the indictment, did not amount to overt acts of treason.

*The jury, without leaving the bar, found a verdict of not guilty.*

NOTE. It being the wish of the counsel for the prisoner, to try fairly all the charges which could be brought against him, to prevent his being sent to Delaware to be tried again, for the treasons alleged to have been committed in that state, no observations were made in the charge, upon the facts of the eighth and ninth counts in this indictment; but the case was considered in the same manner, as if they had charged the prisoner with an intention to procure provisions by force, leaving the prisoner to move in respect of judgment, if a verdict had been found against him.

## GOYON &amp; EFRIN vs. PLEASANTS.

Insurance was effected on goods on a voyage at and from Guadaloupe to a port in France, on the Atlantic. The vessel, instead of going direct to France, stopped at Santos two or three days, which was proved to be the safest and most usual route in time of war.

If the vessel went to Santos with the honest intention to avoid British cruisers, and remained there no longer than was necessary, the deviation was excusable.

THE policy, subscribed by the defendant, was on goods on board the Elizabeth, on a voyage at and from Guadaloupe to a port in France, on the Atlantic; premium 50 per cent.; to return 30, if the risk should end without loss.

The vessel sailed from Point Petre, on the 10th of March 1809, and proceeded to the Saints, where she stopped for three or four days, to make observations if there were any enemy's cruisers in the offing; and then proceeded on her voyage, by a route, not in the direct course of her voyage, but such as was proved to have been the most safe, and such as three-fourths of all vessels going from Point Petre to France, usually pursued during war. It was proved, that after the capture of Marigalante, an island in the direct route to France, by the British, in 1806, the ocean, surrounding that island, was much infested with British cruisers; and that an attempt to proceed that way would have been attended with great danger;—that the safest plan was to sail from Point Petre, at night, to the Saints, (islands distant about fifteen miles from that port,) and from the high grounds on the island, to ascertain whether it would be safe to proceed.

The vessel was captured, some days after she left the Saints, by a British cruiser, and was regularly condemned.

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Gibson et al. vs. Pleasants

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It was contended, by Chauncey and Binney, for the defendant, that the vessel, by going out of the direct route to France, and touching at the Saints, was guilty of a deviation; and that the custom attempted to be set up by the plaintiffs, is neither ancient nor uniform. Park, 6th ed. 309. Marshall, 185. Martin vs. Delaware Insur. Co. in this Court. (Vol. II. p. 254.)

WASHINGTON, Justice, charged the jury. We do not understand the ground taken by the plaintiffs' counsel, to excuse a deviation from the direct route from Point Petre to France, to be confined to the proof offered by him to establish a usage to touch at the Saints, and to proceed on from thence. But the real and substantial justification of the deviation, is, that it was more safe to pursue the course which this vessel took, than the direct route by Marigalante. And, if you are of opinion that this vessel went out of her way, and touched at the Saints, with the honest intention of avoiding British cruisers, remaining there no longer than was necessary, then the deviation is excusable, and the plaintiffs are entitled to a verdict.

*Verdict for plaintiffs.*

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 Lessee of Banert et Ux. vs. Day.
 

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LESSOR ~~OF~~ BANERT & WIFE vs. DAY.

It is no objection to the testimony of a witness who deposes to general reputation of pedigree, that he is not one of the family, or intimately acquainted with it.

The deposition of a witness, now dead, as to pedigree, may be read for that purpose only; though it was taken in another cause, between other parties, and on a different subject.

A deposition taken under a rule of Court, and sworn to before a justice of the peace, may be read: the provisions of the Judiciary Act refer to depositions taken without such rule.

A witness whose deposition has been taken *de bene esse*, must be proved to have been served with a subpoena, and is unable to come; unless he is so old, and generally so infirm, that his attendance could not be expected: the age of 65 is not of itself sufficient to entitle it to be read.

A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read.

A genealogical table, certified under the seal of a foreign officer, is not evidence.

**EJECTMENT** for land lying in Pennsylvania, claimed in right of the female plaintiff, as cousin and heir at law of F. Weiss, Jun. who died intestate, and without issue. The only questions decided by the Court, were upon the admissibility of evidence. The following points were resolved:—

1. That it is no objection to the testimony of a witness who proves general reputation as to pedigree, that he is not one of the family, or intimately acquainted with it. The weight of his evidence, of which the jury must judge, will depend much on his means of information. 8 Johns. Rep. 129, cited in support of the evidence.

2. That a deposition of a witness, since dead, proving the pedigree of the plaintiff, may be offered in evidence in this cause, for this purpose only, although it was taken in another

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Lessee of Banert et Uz. vs. Day.

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cause, between different persons, and on a different subject. It is at least equal to what a person has said, who was not on oath, on the same subject. In support of the evidence, were cited Bull, 233. 239. Hurst vs. Jones, in the former Circuit Court of this district. Against the evidence, 2 Ball. 118. 2 Stra.

3. A deposition taken *under a rule of Court*, and executed by a justice of peace, may be read: the 30th section of the Judicial Act relates to depositions taken without a rule of Court. The decision in this case is in strict conformity with the practice of this and the District Court.

4. A witness, whose deposition was taken *de bene esse*, and is offered to be read, must be proved to have been subpoenaed, and to have been unable to come; unless it is shown, that he is so advanced in age, and generally so debilitated, that his attendance could not be expected. The witness in this case was only sixty-five years of age, and his deposition was rejected.

5. If a deposition be taken by other persons than those named in the commission, it cannot be read, although it is offered merely to prove a pedigree.

6. A genealogical table, certified under the seal of a foreign public officer, is not evidence.

*Upon the two last opinions being given, the plaintiff suffered a nonsuit.*

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The United States vs. Wells

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## THE UNITED STATES vs. WELLS.

Motion for a rule to show cause why execution shall not be stayed—the defendant claiming that he is entitled to further credits from the United States, which will reduce the amount of the judgment confessed in their favour.

The Court will not even grant a rule to show cause why the motion shall not be granted, unless upon affidavit, stating precisely what credits are claimed, and the nature of them.

**JUDGMENT** having been confessed in this case at a former Term, the District Attorney agreeing to stay execution, in order to give the defendant an opportunity to obtain such credits as the Comptroller and Auditor of the Treasury (to whom the subject was by this agreement referred) might think the defendant entitled. Those officers did not act in the business; and the defendant now moved for a rule to show cause why execution should not be stayed, and the defendant permitted by some means to show credits against the judgment.

*By the Court.* The reference, in this case, was agreed to merely as an indulgence to the defendant, who had no credits to offer, which could avail him at the trial. Unless he comes forward with a special affidavit, stating precisely what are the credits he claims, and the nature of them, the Court will not even grant the rule.

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Romayne vs. Duane.

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**ROMAYNE vs. WILLIAM DUANE & WILLIAM J. DUANE.**

Indictment for a libel in the Aurora, a newspaper published by the defendants.

The contents of a receipt, said to have been signed by one of the defendants, or the manner of signing it, cannot be given in evidence—the receipt should be produced.

Character being put in issue in this cause, the plaintiff may give evidence of his character, before it is attacked by the defendants.

No man is at liberty to trifle with the character of another, by publishing charges against him, calculated to bring him into general contempt, and then justify himself by stating his authority, and proving the statement. Evidence that the charge was taken from the Journals of Congress, and thus showing that the publishers are not the authors of the scandal, may be given in mitigation of damages.

**ACTION** for a libel, published in the Aurora, which charged the plaintiff with being a conspirator, and recorded as such on the Journals of Congress. Plea, not guilty, with leave to justify.

William Duane admitted himself to be the editor of the Aurora. The other defendant did not; and in order to prove that he was concerned in the paper, the plaintiff asked one of his witnesses, if he had not seen William J. Duane sign receipts in the name of himself and Wm. Duane. The Court decided, that the witness could not be allowed to state any part of the contents of a receipt, or the manner of signing it—the receipt itself ought to have been produced.

The Court also decided, that in this case, character being put in issue, the plaintiff might give evidence of his character before the defendants had attacked it. See 2 Esp. Nisi Pri. 112. 3 Mass. Rep. 546. 1 Johns. 46.



*Romayne vs. Duane.*

Another question was, whether the defendants could give the Journals of Congress in evidence, to support their plea of justification? If not, it was contended that they might do so in mitigation of damages, on the general issue. In favour of the motion, was cited *1 Binney, 85. 96* : against it, *2 Stra. 1200. Willis. Rep. 20.*

*By the Court.* The substantial matter in issue, is the scandal published against the plaintiff, and not the authority from whom or whence it was obtained. No man is at liberty to trifle with the repose of another, by publishing to the world charges against his character, which are calculated to bring him into general contempt, and then justify himself, by stating his authority, and proving the statement. The evidence may be given in mitigation of damages, by showing that the publishers were not the authors of the scandal.

A juror was withdrawn, in consequence of the sudden illness of one of the defendants' counsel.

## WILCOCKS, APPELLANT vs. PALMER, APPELLEE.

**Libel for mariner's wages.** Palmer stated in his libel, that he had shipped, and signed articles for a certain voyage; and was forcibly expelled from the vessel during the voyage, without cause. The answer denied the allegations in the libel, and charged the mariner with mutiny, &c. To entitle the appellee to wages, he must not only produce the shipping articles, but must prove he performed the voyage, or show a legal cause for not having done so.

**THIS** was a libel filed by the appellee in the District Court, setting forth that he shipped on board of a vessel owned by the appellant, as a mariner, on a voyage from Canton to Philadelphia, and signed the shipping articles;—that the ship sailed on her voyage, and stopped at a port in the island of Java, where the libellant was forcibly turned on shore by the master, and without any cause kept out of the ship, and was prevented from performing his contract;—that the vessel arrived in safety at Philadelphia, where the libellant some time afterwards followed her.

The respondent, by his answer, states, that whilst the ship was lying at Soura Baya, near the straits of Bally, the libellant was guilty of mutiny, and deserted from the ship. He denies that the libellant was turned on shore by the captain, and was kept out of the ship, and prevented from performing his contract.

The District Court decreed in favour of the libellant for the amount of his wages, from which an appeal was taken to this Court.

*WASHINGTON, Justice.* There is no evidence produced in this Court, nor does it appear, that there was any in the

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Wilcocks vs. Palmer.

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District Court, but the shipping articles; and the only question is, whether the libellant is entitled to a decree, without proving the charges in his libel? Upon this point, we entertain no doubt.

To entitle the libellant to recover his wages, he must not only state, that he contracted by the shipping articles to serve on board the vessel for a certain voyage, but he must also state, that he performed his contract; or if not, that he was prevented from doing so by some circumstance which amounts to a legal excuse. If the respondent denies the truth of the alleged excuse, then, the libellant must prove it; or else it appears, by his own statement, that he did not perform the contract, in which event, only, he is entitled to his compensation; and he shows no excuse for his not having done so. In this case, the respondent denies the truth of the excuse alleged by the libellant, for his not performing his contract; and then proceeds to state other reasons, why the libellant is not entitled to his wages. If the libellant had proved the allegations of the libel, then it would have been incumbent on the respondent to support his answer.

*Decree reversed, with costs, and libel dismissed.*

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Lessee of Wells vs. Wright et al.

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## LESSEE OF WELLS vs. WRIGHT ET AL.

Ejectment. A party cannot set up a title to land by settlement, prior to the day stated for the commencement of his settlement, in the warrant issued to him for the land; but he may prove the land was never in the possession of the party who claims it from him by right of settlement.

A survey made by order of the Board of Property, merely to mark the boundary of land claimed by the person for whom it is made, and not in execution of a warrant issued for the land, is not such a survey as will give title.

THE plaintiff, to prove his title, gave in evidence, that some time in the year 1771, Samuel Wells, under whom he claims, went upon the land in dispute, girdled some trees, and collected together and burnt a parcel of brush, raised a cabin, but without a roof; and then retired to some other part of the country, where he remained until the next year, when he returned to the land with instruments of agriculture; and finding the land in the occupation of one Boggs, he demanded the possession, which Boggs refused, and forcibly drove Wells off, and burnt the half-finished cabin which Wells had erected. Wells then served an ejectment upon Boggs, and in 1774, he recovered a judgment and took out a writ of possession, which was continued down till some time in the year 1791. In 1774, Wells again went upon the land & erected a small cabin; placed in it some furniture; and during his absence in order to remove the remainder of his furniture, the cabin was burnt, and possession refused to Wells, on his return, by two men, of the names of Link and Backhouse; who, it appears, had settled on the land in 1772, and continued to live, and raise corn on it, until they sold their settlement right to the defendants. In 1791, Wells, the plaintiff, took out a writ of possession

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Lessee of Wells vs. Wright et al.

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in the name of Samuel Wells, against Boggs, and had it executed; when the defendants agreed to consider themselves as tenants of the plaintiff, and to pay him a rent, until amicable ejectments, which the defendants agreed to bring against the plaintiff, could be decided; and that if they should be decided in favour of Wells, then, the defendants agreed to deliver him peaceable possession of the premises. These ejectments were tried in 1792, and decided in favour of the present defendants. On the 5th of March 1785, a warrant issued to the plaintiff for four hundred acres of land, to include the improvement made by Samuel Wells; interest to commence from the 1st of March 1771, and the consideration was paid in November, of the same year. In the year 1788, the plaintiff filed a caveat in the Board of Property, against grants issuing to some of the defendants; in consequence of which, the Board directed the surveyor to lay off the plaintiff's claim, which was done; and a survey and plat returned, containing five hundred and twenty acres, including a part of each of the tracts claimed by the defendants. The Board continued the caveat from day to day, until the ejectments above mentioned should be decided; and in the year 1795, they dismissed the caveat, and ordered patents to issue to such of the defendants as had been caveated.

The defendants claim under warrants, surveys, and patents, regularly obtained; the warrants being all prior in date to the plaintiff's, except the one to Wright, which issued in 1786. The warrants express, that interest is to run from a period subsequent to 1772.

The defendants offered to read depositions, to prove the possession of Link and Backhouse, in 1772, and continued down to the time of their sale to the defendants, or those under whom they claim; which was objected to, because a party can never prove a settlement in himself, or in the person under whom he claims, prior to the time of the settlement stated in his warrant, which is that from which the interest is to run. 2 Smith's ed. of the Laws of Pennsylvania, 177, 178. *By the*

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*Lessee of Wells vs. Wright et al.*

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*Court.* The defendants cannot set up a title by settlement, prior to the day stated for its commencement in the warrant; but they may read the depositions, to show that the land never was in the possession of the plaintiff, by right of settlement.

The objections made to the plaintiff's title, were—

1. That he never had, at any time, made a settlement.
2. That the plaintiff's warrant was never regularly surveyed; and of course, that he does not come within the case of *Simms vs. Irvine*.
3. That the plaintiff is barred, by not having brought his ejectment within six months after the caveat was dismissed; 2 vol. State Laws, 3d April 1792. 4 Dall. 370. Contra, 2 Laws, Smith's ed. 207. 166. 2 Binney, 114.
4. That the plaintiff is barred by the Act of Limitations; the possession of the defendants, or those under whom they claim, having been uninterrupted from 1774. 2 vol. State Laws, 282, passed 26th March 1785.

Many cases were cited on both sides, on the point of settlement. 2 vol. State Laws, 487. 2 Smith's ed. of the Laws, 173. 175. 186. 168. 174. 235. 237. 301. 224. 306. 4 Dall. 161. 210. 221. *Idem*, *Balfour vs. Meade*. Addison's Rep. 216.

*WASHINGTON, Justice*, charged the jury. The substratum of the plaintiff's title, is settlement. If that be in his favour, and has been followed up with reasonable diligence in obtaining a legal title, he must prevail even against those defendants, whose warrants bear date prior to his. If he has failed in establishing a right by settlement, the verdict must be against him.

What constitutes a settlement, has been repeatedly decided in this, as well as in the state Courts of Pennsylvania. It consists in actual occupancy of some part of the land intended to be appropriated, and the continuation of it; thereby manifesting an intention to make it the place of the party's abode, not at some future day, but at and after the day when posses-

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*Lessee of Wells vs. Wright et al.*

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sion is taken. If he mark off the land he means to settle, and builds even a habitable house, and then leaves it, intending at some future period to return and live in the house so erected, his settlement will commence only from the time when he does return; the building of the house amounts to an improvement only; and if, before he returns, with a view to take possession of the land, and to make it from that time the place of his abode, some other person shall have obtained possession and settled himself on the land, and is found so settled by the first improver, the latter cannot set up an improvement right, against the settlement right thus acquired by the former. Settlement upon these frontier lands, (which the state of Pennsylvania acquired by cession in 1768, at Fort Stanwix,) amounted to an equitable consideration, sufficient to entitle the settler to a grant, even prior to the Act of 1784. But it was such a settlement as fulfilled the policy of the government, by presenting a barrier to the savages, and promoting the sale of the public lands to those who might not choose to settle. But vacant cabins, accompanied by declarations of intention to inhabit them at some future period, did not answer the public policy; and of course, amounted to nothing, until the settlement was in fact made. The Act of the 30th December 1786, declares what kind of settlement shall give a title to the lands ceded by the treaty at Fort Stanwix—that it must be “an actual residence settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into military service.”

The question, then, for your consideration is, whether Wells made such a settlement as we have described, in 1771, or at any subsequent period. In 1771, he girdled some trees, collected and burned a parcel of brush-wood, raised the logs of a cabin, but without making it habitable; and then returned to his former residence, or retired to the settled parts of the country, intending most probably to return the next year, and to

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 Lessee of Wells vs. Wright et al.
 

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continue on the land which he had thus slightly improved. In 1772, he accordingly returns, with agricultural instruments; and the sincerity of his intention to remain, may fairly be conceded. But in the mean time, Boggs had taken actual possession of the land, having burned the logs of Wells's cabin, and erected another for himself, which he inhabited. Wells considered Boggs to be an intruder upon his land, and endeavoured to gain the possession; Boggs, with much greater propriety, considered Wells as an intruder, and compelled him to quit the premises. Upon what ground Wells obtained a judgment in his ejectment against Boggs, it is impossible to conceive; but, as it appears, that two other persons, Link and Backhouse, obtained the possession, and settled themselves upon the land some time in 1772, it is probable, that Boggs took no farther notice of the suit; in consequence of which, judgment was obtained against him. From 1772, the possession continued in these persons; and, except a temporary possession gained by Wells in 1774, under a writ of possession against Boggs, it does not appear, that Wells, at any period of time, was settled upon this land. He complains, that he was prevented by Boggs and these other men from doing so; but the answer is, that they had a right to keep the possession, because they had acquired a legal title by settlement, in opposition to Wells's claim by improvement, which gave no right whatever. This right, by settlement, being followed up by a regular office title, must prevail against the improvement and office title of the plaintiff.

But independent of the better right of the defendants, the plaintiff has not, in the opinion of the Court, such a title as will support an ejectment in this Court. In the case of *Simms vs. Irvine*, the Supreme Court decided, that a warrant, survey, and consideration paid, vests a legal right of entry into lands lying in this state; but the survey ought to be in execution of the warrant, and such as would entitle the party to a patent. Now, in this case, the order of the Board of Property was to sur-



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*Lessor of Wells vs. Wright et al.*

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vey the claim, not to execute the warrant of the present lessor of the plaintiff; and in laying down this claim, it is made to cover five hundred and twenty, instead of four hundred acres; and this by interfering with all the defendants. Now, it may be admitted; that if the only title to this excess, adverse to the plaintiff's, had been that of the state, a patent would have issued, upon the plaintiff paying the sum demanded by the state; but not so, if it interfered with the claims of third persons. One thing is clear, that the lessor of the plaintiff, if he had a title against the defendants, to any part, is not entitled to five hundred and twenty acres, and cannot obtain a patent for it; how, then, can this Court locate for him, the quantity to which he claims to be legally entitled, so as to enable him to recover, in any one of these ejectments? Upon the first point, however, the Court is of opinion, that the defendants are entitled to verdicts.

*Plaintiff suffered a nonsuit.*

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Marcan vs. The United States Insurance Company.

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**MAREAN vs. THE UNITED STATES INSURANCE COMPANY.**

Insurance on goods on board the brig Betsey, from Cape Henry to Lisbon. The cargo consisted of corn, corn meal, and navy-bread, and the policy contained the usual memorandum, in which it was stated, that upon certain articles, and among them those insured, the insurer agreed to pay for a total loss only. The brig Betsey was driven on shore, within one or two miles of Lisbon; and the cargo was so injured, that when the part which was taken to Lisbon, was sold, it did not pay the expenses of saving it; and the insured claimed, in this action, for a total loss.

As to memorandum articles, the insurer agrees to pay for a total loss only; and if the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total; and the insured cannot treat it as a total loss, or demand indemnity for a partial loss.

There is no instance where the insured can demand, as for a total loss, that he might not have declined making an abandonment, and demanded a partial loss. If the property insured, be included within the memorandum in the policy, the insured cannot, under any circumstance, call upon the insurer for a partial loss; and consequently he cannot elect to turn it into a total loss.

**ACTION** on a policy, dated 14th December 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of 6 per cent. valued at five thousand dollars, the sum underwritten; declared to be against all risks, except British captures; warranted neutral. The jury found a verdict for the plaintiff, subject to the opinion of the Court, on the following facts agreed by the counsel.

The cargo consisted of 4406 bushels of Indian corn, 100 barrels of navy-bread, and 20 barrels of corn-meal. The brig sailed from Baltimore on the 11th, and from Cape Henry on the 13th of November; she experienced on the voyage many severe gales of wind. On the 18th of December, she passed the

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rock of Lisbon, and came to anchor about four miles below Belem Castle. She leaked considerably, in consequence of the injury she had sustained, from the violent gales to which she had been exposed. After passing the rock, the wind died away, and the current being adverse, she came to anchor. The captain and supracargo landed; went through the customary forms at Belem, to obtain a permit to pass the Castle, and then proceeded to Lisbon. The health-boat visited the brig, and ordered her to get above the Castle, as soon as possible. On the 19th, she was again exposed to a heavy and fatal gale, which drove her ashore, just below Belem Castle, the sea breaking entirely over her. The supracargo considered both vessel and cargo as totally lost; but by directions of the custom-house, as much of the cargo as could be got out, was unladen, by a number of French prisoners, who were employed for that purpose. The cargo was all wet, and the part of it which was taken out, was carried to the Castle, where it was dried. From thence it was carried to Lisbon, in lighters, and was sold in the corn market, by the consignee of the cargo, at about one-fourth of the price of sound corn. The quantity thus saved and sold, amounted to 1988 bushels. The supracargo petitioned for liberty to sell, at the place where the corn was first deposited, which could not be granted; and he was obliged to submit to the custom of the place, and allow it to be sold at the corn market. The brig was so completely wrecked, that she was sold, with her materials, in lots, where she lay. Had the supracargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage, and the great expense of saving it. The nett proceeds of the cargo, after paying the expenses of unloading, drying, and selling it, exceeded very little the expenses of the supracargo, in attending to the business. The port of Lisbon commences above Belem Castle, and the custom of the place is to discharge cargoes of corn, between that Castle and Cantara; which latter place, is from one to two

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miles below Lisbon. The vessel never arrived at her port of discharge. She was entered, on the 23d of December, at the custom-house, by the American consul; which, he said, was a necessary measure; but port duties do not attach to vessels, till they pass the Castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the consul, and the dues were paid. On the 11th of March, the plaintiff having received notice of the shipwreck, offered to abandon, which was refused.

Chauncey and Sergeant for the plaintiff, contended, that the loss as to the cargo amounted to a total loss; and if not so, then—2, the voyage was lost, the vessel having been wrecked before she reached her port. That although a part of the cargo was saved, it was done by the orders of the government, not of the agents of the insured; and was not restored to them with full power to do with it what they pleased. That a right to abandon once existed; and it continues, unless before the offer is made, it is restored to the owner, in a condition to prosecute the voyage, clear of the effects of the peril—none of which circumstances concur in this case. Cases cited, 1 Marsh. 222. 3 Burr. 1553, *Wilson vs. Smith*. 1 Marsh. 226. 2 Stra. 1065. 1 Marsh. 227. 229. 233. 588. 7 T. Rep. 210, *Burnet vs. Kensington*. 3 Bos. & Pull. 474, *Dyson vs. Rowcroft*. 1 Johns. Cases, 226, *Leroy vs. Gouverneur*. 3 Caines, 108, *Neilson vs. Columbia Ins. Co.* 1 Caines, 212, *M'Grath vs. Church*. 2 Idem, 324. 2 Marsh. 586, *Manning vs. Newnham*. Idem, 582. 486. 582. 585. 587. 566, *Goss vs. Withers*.

Binney and Rawle, for defendants, insisted, that there can be no partial loss on memorandum articles, if they arrive at the port of delivery, either for deterioration, inequality, or reduction in quantity; and that it is the duty of the insured, to send on the cargo, however injured, if he has the means to do so; and he cannot, by neglecting to do so, turn a partial into a total loss. If this, as a partial loss, was a case out of the policy, it cannot be treated as a total loss, under any circumstances. Although the

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insured might, whilst the loss by the shipwreck continued, have abandoned, yet he cannot do so, if, at the time the offer is made, the loss has ceased to be total. *Park, 152, Cocking vs. Frazer. Idem, 116, Mason vs. Skurrey. 4 T. Rep., Nisbet vs. Lushington. 9 Johns. Rep. 21. Shefton vs. N. Y. Ins. Co. 2 Comp. N. P. Rep. 623, Wilson vs. Roy. Ex. Ins. Co. 7 East. 38, Anderson vs. Roy. Ex. Ins. Co. Park. 195, Hamilton vs. Mendez. Park, 153. 156.*

*WASHINGTON, Justice*, delivered the opinion of the Court. We shall in the outset, dismiss from this case all considerations connected with the loss of this cargo, in respect to quantity or value. As to memorandum articles, the insurer agrees to pay for a total loss only—the insured taking upon himself all partial losses, without exception. If the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total, in reality; and the insured cannot treat it as total, or demand an indemnity for a partial loss. There is no instance where the insured can demand, as for a total loss, that he might not have declined making an abandonment, and demanded a partial loss. But, if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss; and consequently he cannot elect to turn it into a total loss. These principles I consider to be clearly established, by the cases of *Mason vs. Skurray*, *Neilson vs. Columbia Insurance Company*, *Cocking vs. Frazer*, *M'Andrews vs. Vaughan*, *Dyson vs. Rowcroft*, and *M'Grath vs. Church*.

The only question which can possibly arise, between the insurer and insured, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen, where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagement—every thing like a promise of indemnity against loss

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or damage to the cargo, being excluded from the policy. If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, we know of no difference between memorandum and other articles. If the loss be total in fact, or is such as the insured is permitted to treat as such, he is entitled to abandon, and to recover as for a total loss, in the case of memorandum articles; but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage, by capture, shipwreck, or otherwise, may be treated as a total loss. This is the doctrine of *Dyson vs. Rowcroft*; in which case, the right to abandon was placed, not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it, of throwing the cargo overboard. This was in effect the same thing, as if it had, in a storm, been swept from the deck. Such too was the case of *Manning vs. Newnham*. In *Cocking vs. Frazer*, no such necessity existed; and the breaking up of the voyage, was attempted to be justified, by the damaged state of the cargo, which, *per se*, did not authorize the insured to put an end to the voyage, and thus to turn an average loss, for which the insurer was not liable, into a total loss. *M'Grath vs. Church*, also establishes the same doctrine.

Now what is the present case? The brig being thrown on shore, within a mile or two from her port of destination, the agent of the insured employs persons to unlade as much of the cargo as could be saved; and by his exertions, nearly a half of it was landed, dried, and sent forward to the market at Lisbon, and sold by the consignees, at about one-fourth of the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of *Wilson vs. The Roy. Exch. Ins. Co.*, and *Anderson vs.* the same? with this difference only, that in the first case, the insured declined sending on the corn, when he might have

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done so, and consequently he was not permitted to turn a partial into a total loss, by his own neglect; and in the latter case, part of the cargo having been rescued from the wreck, before the offer to abandon was made, the insured could not claim as for a total loss, either on account of the injury which the corn had sustained, or of his own act, in not sending it forward to the port of its destination. In this case, the cargo, which was saved was sent forward, and sold at the port of its destination. But it is contended by the counsel for the plaintiff, that if the loss be such, as that the insured might at one time have treated it as total, it continues to be so, unless at the time when the offer to abandon is made, it is restored to his possession, clear of the effects of the peril, and in a condition to prosecute the voyage. Now this is certainly not the condition of property, which, at the time of the offer to abandon, is in possession of the recaptor, who has a right to retain it, until he has satisfied his salvage. But in this case, the corn was never out of the possession of the agents of the insured, who exercised every act of ownership over it; subject nevertheless to the laws and customs of the country to which it was sent, with which the insurer and insured are supposed to have been acquainted, at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo which was landed, not only continued in the possession and under the direction of the agents of the insured, but it was relieved from the effects of the peril, as between the insurer and insured; and it was not only in a condition to prosecute the voyage, but it did in fact complete it.

Upon the whole, we are clearly of opinion, that this is not such a loss as the defendants have engaged to indemnify against, and that judgment should be given in their favour.

*Judgment for defendants.*

This opinion was, upon a writ of error to the Supreme Court, affirmed throughout.

**DIAS ET AL. vs. THE OWNERS OF THE PRIVATEER REVENGE.  
BUSTAMENTO & OTHERS vs. THE SAME.**

Libels were filed in the District Court, in order to make the owners of the privateer *Revenge* answer in damages, for the injury sustained by the owners of the Portuguese and Spanish vessels, for piratical acts of the officers and crew of the *Revenge*, and for which they had been indicted in the Circuit Court, (*ante*, pages 209. 224. 228.) The question, in these cases, was, whether the owners of a commissioned privateer are liable, civilly, for piratical acts committed by the officers and crew of their vessel?

To a certain extent, a privateer is a national vessel, and forms a part of the national force.

*Provisions of the laws of the United States, relative to commissions to be granted to privateers; the powers which are derived from such commissions; and the obligations and responsibilities of the owners and commanders of such vessels, under the law.*

*For the conduct of the officers and crew, in the execution of the business in which they may be employed, the owners are, by the maritime law, liable; if through ignorance, or illegally, they do an injury to others.*

*But if the master exceed his authority, and violate his orders, and is guilty of faults or crimes to the injury of others, acting in some business different from that for which he was employed, the owner is not liable.*

To warrant the conclusion that the owners of the privateer are liable for injuries done by the master and crew, there must be a capture as prize of war; but in a piratical unauthorized seizure and spoliation, these acts not being in the business of the expedition, the owners are not liable beyond the penalty of the bond given according to law, and the loss of their vessel.

**THESE** were appeals from the District Court of Pennsylvania, dismissing the libels of the appellants, which sought to make the appellees liable for acts of piracy committed by the officers and crew of the privateer, on the high seas. By the evidence in the first case, it appears, that in November 1812,



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the Portuguese brig *Triomphe de Mars* was chased and brought to by the privateer *Revenge*, Butler master, under English colours, which continued flying during all the transactions which afterwards took place. The brig was boarded by an officer from the *Revenge*, who, after a slight view of the ship's papers, presented a pistol to the breast of the captain, and told him that he was a prisoner. He then ordered the officers' trunks to be opened, from which he took all the money he could find, which, together with some sugar, rigging, the clothes belonging to the officers and crew of the brig, and other property, he carried on board the privateer. After remaining on board the brig for about four hours, the officers and crew of the *Revenge* returned to their own vessel, and the brig was permitted to proceed on her voyage to New-York, where she arrived in safety.

In the other case, the *Iris*, belonging to Spanish subjects, bound on a voyage from Havana to Cadiz, with a cargo also the property of subjects of Spain, was, some time in November 1812, chased by the above privateer, which fired a gun to bring her to: the ship then fired a gun, hoisted Spanish colours, and lay to. The privateer came up with her, under English colours, and after firing two broadsides into her, and a round or two of musketry, an officer was sent on board the ship, with orders to send the master and some of the crew to the *Revenge*; which was accordingly executed. The master and crew of the ship were then manacled; after which, a bag containing 800 dollars in silver, eight boxes containing 3000 silver dollars each, and about 400 pounds of bullion, together with a number of other articles, were brought from the ship to the privateer, and deposited in the cabin. All the property of value, found on the persons of the master, his officers and crew, including their wearing apparel, were seized by order of captain Butler; and after some hours' detention, they were permitted to return to their ship, and to proceed on their voyage.

A few days after this, the *Revenge* again overhauled the *Iris* attempting to make some port of the United States, in order to

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procure clothes for the crew. Some of the clothes, which had been taken by the privateer's men, were then restored to the crew of the *Iris*; the master was ordered to proceed to Cadiz, and, at the peril of being very severely treated, they were cautioned not to be seen again on the American coast. To ensure the execution of this order, the *Revenge* accompanied the Spanish ship for two days; when they parted. The money thus plundered from the Spanish ship was, a few days after it was taken, divided amongst the officers and crew of the privateer.

It was contended by C. J. Ingersoll, and J. R. Ingersoll, for the appellants, that, upon the doctrine of law, as applicable to master and servant, the owners of a privateer are responsible for acts of piracy, committed by the officers and crew which they have appointed. Their commission being general, to capture the vessels of neutrals as well as of enemies, the master acts within the general scope of his authority, when he commits outrages of this sort; and of course, if he abuse this authority, the owners are liable. Cases cited, 8 Black. Com. 431. 430. 1 *Ld. Raym.* 224. 264. 739. *Salk.* 234. 2 *Dy.* 238 *b.* 161 *a.* 1 *Binney*, 249. 1 *Black.* 430. *Domat.* 238-9. 4 *Dall.* 206. 3 *Idem*, 333. 1 *Idem*, 185. 2 *Vern.* 543. *Roccus*, 22. *Molloy*, 212-13. 203. 1 *Rob.* 84. *The Mercurius*; 151, *The Vrow Judith*; 156, *The Columbia*. 2 *Idem*, 90, *The Rising Sun*; 134, *The Calypso*. 5 *Idem*, 234, *The Shepherdess*; 262, *The Karman*; 42, *The St. Juan Baptista*; 318, *The Die fore Damer Gaisi*. *Hopk. Rep.* 65. *Bynk.* 150. *Beawes's L. M.* 207. The principle of all the cases is, that the owner puts it into the power of the master to commit the wrong. 2. This is not a case of piracy, which cannot be committed by a commissioned privateer. *Bynk.* 128. 135. *Azuni.* 3 *Woodeson*, 443.

Chauncey and Binney, for the appellees, contended, that the whole question turned upon the nature of the taking—if as *prize*, though wrongful, the owners are liable, because the master is authorized to make capture as *prize*. But if piratical, they are not liable, because the master has no authority to

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commit acts of piracy. This distinction will explain all the cases, and reconcile them. They cited, upon the two points made by the appellants' counsel, the following cases: Sea Laws, 339. 369. 462—9. 2 Brōw. Adm. & Cfv. Law. 461. 472. 1 Molloy, 64. Beawes's L. M. 228. 1 Blac. 429. Salk. 282. 441. Moore's Rep. 786. Skinner, 228. 15 Vid. 310. Comb. 459. 1 East, 106. Molloy, 64. Lee on Capt. 224—8—9. Molloy, 66. Vatt. 150. Bynk. 129. 133, notes. Sea Laws, 475—6. Molloy, 65. Grot. b. 2. c. 17. s. 20. s. 1. 2 Azuni, 352. Roll's Abr. 530. Moore's Rep. 776. 2 Molloy, 90. Sea Laws, 444. 476—7.

*WASHINGTON, Justice*, delivered the opinion of the Court. The argument, in these cases, has taken a very wide range, in which most of the principles and authorities of common, maritime, and national law, which appeared to the counsel to have any bearing upon them, have been pressed into the service of one side or the other. In the view which we shall take of them, we shall commence with the precise question before the Court, noticing the authorities which do not directly apply to it, merely as illustrations of the doctrines by which our decision will be governed.

The question is; whether the owner of a commissioned privateer is liable to make good the damages which a neutral has sustained, by an act of piracy, committed upon him by those to whose management the owner had intrusted his vessel? In order to arrive at any satisfactory result, in this inquiry, it will be necessary to consider—1. What is the precise character of a privateer, and what are the acts which she is authorized to perform? To a certain extent, she is a public vessel, and forms a part of the national armed force. The declaration of war authorizes the President to issue letters-of-marque and general reprisal, in such form as he shall think proper, against the vessels, goods, and effects, of the government of Great Britain, and the subjects thereof; and by the Prize Act, he is empowered to revoke such commissions, whenever it may be his pleasure

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to do so. The commission, so issued, authorizes the privateer to subdue, seize, and take, any British vessel found within the jurisdictional limits of the United States, or elsewhere on the high seas, and to bring the same into some port of the United States; to recapture American vessels, or those belonging to friendly nations, found in possession of the enemy; and also to detain, seize, and take all vessels and effects, to whomsoever belonging, which may be liable thereto, according to the law of nations, and the rights of the United States as a power at war; and to bring them in for adjudication. The President is also empowered, to establish suitable instructions for the better governing and directing the conduct of vessels so commissioned, their officers and crews; copies of which are to be delivered to the commanders. And, for the better security of those who may be injured by the improper conduct of such vessels, in the execution of the powers imparted to them by their commissions, the owners (a list of whose names and places of residence is required to be made out and filed with the Secretary of State) and the commander of the privateer, are required to give bond to the United States, with sureties, in a certain penalty, with condition that the owners, officers, and crew, to be employed on board such vessel, will observe the treaties and laws of the United States, and the instructions which shall be given them, according to law, for the regulation of their conduct; and will satisfy all damages and injuries which shall be done and committed, contrary to the tenor thereof, by such vessel, during her commission; and to deliver up the same, when revoked by the President. As further evidence of the public character of a vessel so commissioned, the officers and seamen are liable to be tried and punished by a court martial, for any offence committed on board any such vessel, in such manner as the like offences may be tried and punished when committed by any person belonging to the public ships of war of the United States.

In other respects, such a vessel is to be considered as private property; equipped and fitted for war, at the sole expense of the

owner; navigated by officers and crew, chosen and appointed by himself, and paid by him; and subject to such lawful orders and instructions as he may think proper to give. In consideration of the expense to which the owner thus subjects himself, in co-operating with the public armed force in hostile operations against the enemy, the nation cedes to him, and those he may employ to conduct the privateer, the exclusive benefit of all the spoil which his vessel may lawfully capture as prize; to be distributed between himself and the officers and crew of his vessel, according to any written agreement which shall have been made between them; and in case no such agreement should have been made then according to a certain ratio prescribed by law.

It results from all this, that the employment of a privateer, and the trust confided to her officers and crew, is to subdue and seize the vessels and effects of the enemy found at sea, as well as all other vessels and effects, to whomsoever belonging, which may be liable thereto, according to the law of nations; and to bring all such property into a port of the United States, for adjudication as prize of war.

2. This being the case, the next question is, what are the responsibilities of the owner of the privateer, for any improper conduct of his officers and crew, in the execution of the business in which they were employed? This question is answered by Bynkershoek, in the most satisfactory manner, in the 19th chapter of his treatise on the law of war: "The master," says this learned jurist, "who captures in consequence of an authority that he has received, is appointed for that particular purpose; and he who appointed him is by that alone responsible for every thing, good or bad, that he may do in the execution of his trust." "He who appointed the captain of a privateer," he continues, "must have known that his business was to make captures, and that if he should execute it improperly, it would be imputed to the owner, for having appointed a dishonest or unskillful captain." In another part of the same chapter, where

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the author is examining the liability of the owner, in the case of a capture made without authority, he observes that "in such case, the owner cannot be made, in any manner, liable; for he, indeed, has put the master in his place and stead, but merely as to the business which he has ordered him to transact; and if, in the course of that business, the master has committed a fault, or has been guilty of a fraud, the owner is bound to answer for him; otherwise not."

It is very clear, that throughout the whole of this chapter, the author is speaking of illegal captures, as prize of war, made by privateers; and the principle which lies at the root of all the law which he lays down, is, that the owner of a privateer, like the owner of a merchant vessel, is bound to provide, honest, skilful, and faithful persons, to navigate her; and that if he fail to do so, he is liable for all damages which others may sustain, by the mistakes or wilful misconduct of those he employs, in executing the business with which he has intrusted them. Against a claim for full compensation for injuries illegally inflicted upon third persons, it is not competent to the owner to shield himself, by saying that the privateer constitutes a part of the naval armed force of the nation; that she acts under the President's instructions; and therefore, he is not liable. The answer given by Bynkershoek in the chapter above noticed, is conclusive.

It may be proper, at this stage of the discussion, to notice the analogies relied upon by the counsel, drawn from the Common Law, in relation to master and servant; and also, from the maritime law, in relation to owner and master of merchant vessels and privateers.

As to the first;—the vintner whose servant sold unwholesome wine;—the smith, whose servant lamed a horse which he was intrusted to shoe;—the householder, whose servant, by negligently keeping his fire, caused the destruction of an adjoining house;—the earman, whose servant, from want of care, in one instance drove over and mangled a child in the street; and in

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another, destroyed a pipe of wine in a cart which he overturned ; — the sheriff, whose deputy seized the property of one person, under process against another, and who levied an execution for costs, where none were due ; these cases proceed, all of them, upon the same principle. In each of them, the servant was employed by the master, and committed the injury wilfully, or from want of skill in the business in which he was employed. The master, in neither case, gave him an authority, either expressly or impliedly, to act in this manner ; but he is, not, on that account, excused from making reparation for the wrong done by a third person employed by him, for whose skill and fidelity he is answerable. The general position laid down by Lord Holt, in the case of *Middleton vs. Fowler*, Salk. 282, is, that the master is not chargeable with the acts of his servant, but when he acts in execution of the authority given him. The case of *M'Manus vs. Cricket*, 1 East, 106, proves too much in relation to a case of capture, for which it was cited by the counsel for the appellants. It admits, that for the mischief arising from the want of skill or negligent driving of the master's carriage, the master is liable, in an action on the case ; but not so, if it were wilfully committed ; because, it is said, that in the latter case, the servant does not act in pursuance of the authority given him. Neither does the master of a privateer act in pursuance of the authority given him by his owner, when he wilfully commits depredations on property seized as prize ; and yet in this, and in similar cases, the owners are clearly liable for the misconduct of the master. The cases of the innkeeper and common carrier, who are responsible ; the first, for the goods of his guest, stolen by any person in his house, and the second, for goods delivered to his servant to carry, of which he is robbed ; depend upon a stricter, and somewhat different principle of law. They are not in the situation of common benefactors ; but from the nature of their employment, and for the safety of the public, they implicitly contract with all persons who may intrust their property to their keeping, to

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keep it safely; and consequently, they cannot, as in other cases of bailment, excuse a breach of this contract, by alleging that they were robbed of the property; nor can they call upon the injured party to prove a particular neglect.

Passing from the supposed analogy of master and servant, at Common Law, to cases governed by the maritime law, in relation to owner and master; we find that the former is liable for all the acts of the latter, done in execution of the business in which he is employed, by which third persons are injured; whether the injury was occasioned by the wilful acts, or by the negligence or want of skill of the master. "The owner of a vessel," says Reccus, p. 28, "is responsible for the contracts and the criminal acts of the master appointed by him; and also, for the faults of the mariners, committed at sea." In the same note, he explains these general expressions, by saying, "if a servant be guilty of any improprieties in the office or employment assigned him by his master, the master is liable for such improprieties, as he should not have employed such a servant; and the fault may therefore be imputed to him." In subsequent notes, the same author lays it down, that if the master exceed his orders, for example, if he charter his ship generally, against express orders; if he take in a cargo, when he is ordered to take only passengers; if he was appointed for a certain voyage, and he proceeds on a different voyage; the owner is not liable. And, indeed, he lays down the doctrine in very general terms, that the owner is not liable for the faults or crimes of his master, if he exceed his instructions, unless the owner is benefited by such act. We should, however, understand this author to mean, throughout, that the exemption of the owner from responsibility, is only in those cases where the master acts, not only without or against orders, but in some other business than that in which he was employed. It is upon this principle, that the owner is liable for spoliation of papers; for injury sustained by a prize, by the unskillfulness of the prize-master put on board of her, for embarkment of the property



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taken as prize by the officers or crew; and for ill-treatment, unnecessarily inflicted upon the persons of the prize-crew. The master was in the execution of a business for which he was employed, and abused his trust by wilful misconduct, or by the want of skill or care.

3. Having thus open for what acts of the master, the owner of a merchant-vessel or privateer is answerable, the question immediately before the Court remains to be examined;—is he liable civilly, for the piratical acts of his master and crew? It is contended, *in limine*, by the appellant's counsel, that the plunder of these vessels did not amount to piracy; because, in the first place, the master acted under a public commission; and in the next, the vessels, particularly the *Iris*, were taken possession of as prize; and the subsequent conduct of the officers and crew of the privateer, amounted to nothing more than spoliation and embezzlement, for which it is admitted the owners are liable. As to the first reason, it was so fully examined by this Court, in the case of the *United States vs. Jones*, one of the officers of this privateer, upon an indictment for this alleged piracy, that it will be unnecessary to go over the same ground in this case. That was a case, in which, if in any, the Court would have felt inclined to favour the doctrine now contended for, if the principles of law would have warranted it. But it was decided, that the acts imputed to Jones amounted to piracy, for which he was liable so-to-armed and punished, notwithstanding the commission under which the privateer sailed. As to the second reason assigned, why the robbery committed upon these vessels could not be piracy, it is totally unsupported by the facts in the case. The hostile act of the privateer, in firing upon the Spanish vessel, was for the purpose of bringing her to; and might, in part, though certainly not as the wanton excess to which it was carried, be justified; if the fact were, as stated by some of the witnesses, that the Spanish vessel fired two guns, loaded with ball, at the *Revenge*. But the *que enim*, with which a merchant vessel is brought to, by

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a vessel of war, cannot be always determined, until after she has obeyed the order to come to, and has submitted to an examination. It is upon a view of her papers, the examination of the cargo, the declarations of those on-board, and a variety of other circumstances, that the master of a privateer is to decide, whether the vessel is, in his judgment, good prize or not. If he decides affirmatively, it is then his duty to put a prize-master, with such additional force as he may think necessary for her security, on board of the prize, and to order her to some port of his own country for adjudication. To vest a right in the captor to claim condemnation, he must not only give some evidence that the seizure was made as prize of war, but he must do no act which amounts to an abandonment. But in this case, there was no examination of papers; no seizure as prize, either by words or acts. No person was put on board, in order to conduct these vessels in for adjudication; nor any attempt made by the spoliators, after they came into the United-States, to condemn the property which they had seized. All was lawless and indiscriminate pillage; and the plunder which, if the vessel had been legally seized as prize, would have belonged in part to the owner after condemnation, was divided on the spot amongst the officers and crew. The true and only character, then, of this seizure, is clear beyond all possibility of doubt. It was a piratical act, and nothing less. Supposing this to be the case, it is then contended, by the appellant's counsel, that for these acts of piracy the owner of the privateer is liable; because his commission authorizes him to capture, not only property belonging to the enemy, but that of all other persons, to whomsoever belonging, which may be liable thereto, according to the law of nations, and the belligerent rights of the United States; and consequently, that capture, generally, being the business in which the officers and crew of the privateer were employed; the owner is liable, upon the admissions of the adverse counsel.

This argument is ingenious, but it will not bear examination.

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It is true, that the commission authorizes the capture of vessels belonging in reality to friends, as well as to enemies, if the friend has so conducted himself, as to bear, *pro hac vice*, the character of a belligerent; and therefore, if an illegal capture had been made in this case, whether wilfully or by mistake, the owners would have been answerable for all the damages resulting from the act. But there must be a capture as prize of war, in order to warrant the conclusion drawn by the appellants' counsel; because, otherwise, the master did not act in execution of the business with which his owners had charged him. The commission did not authorize him to seize, in any manner he pleased, the property he might find at sea, to whomsoever it might belong, but to seize as prize of war;—to exercise an acknowledged and legitimate belligerent right; in doing which, he might be guilty of a mistake, or might wilfully abuse this right; in either of which cases, he acts at his own and his owner's peril. Still, however, he acts in a lawful employment. But if he turns his back upon the business intrusted to him, and sanctioned by his commission, and commits acts of piracy, for which he was not directly or impliedly employed; such acts are imputable to those only who perform them, and cannot, upon any principle of common, maritime, or national law, be visited upon his owners, beyond the penalty of their bond, and the loss of their vessel.

If, from general principles of law, we go in search of adjudged cases upon the point in question, the pursuit terminates in disappointment; and yet this very circumstance strongly fortifies the general principles. Taking it for granted, that acts of piracy have been frequently committed by the commissioned privateers of other civilized nations; and considering also the general incompetency of the master and crew, to make reparation for the injuries which such acts inflict, it is scarce possible, that cases should not have occurred, in which the owners were called upon to make the compensation, unless

from a prevailing opinion amongst legal men, that they were not liable. It is by no means a satisfactory answer to this remark, to say, that the owners, when these claims have been made, may have adjusted them without suit, considering the law to be against them; because, so far as a *dictum* upon the point is to be met with, the liability of the owners is denied. It must at the same time be admitted, that there is very little information upon the subject, from any elementary writer. We have looked into the cases cited, and relied upon by the counsel for the appellees, without having derived much satisfaction or assistance from them. The passages read from the Sea Laws, from Molloy, and from Beawes's *Lex Mercatoria*, refer to Roll's Abr. 530, as their authority; and where Beawes gives an opinion as his own, it is so obscurely stated, that it is impossible to say, whether he is speaking of captures or prizes. Lee, in the place which was cited, is clearly speaking of captures; and consequently, his opinion, that in such a case, the owner is not bound to answer beyond his ship, and the penalty of his bond, is not law. Roll's Abridgment, therefore, is the only authority which was cited; and he merely says, that "if a letter-of-masque commit an act of piracy on a friend of the king, without the knowledge or assent of the owner; yet, for this, the owner shall lose his vessel by the admiralty law, of which our law ought to take notice;" but nothing is said respecting the personal responsibility of the owners. We feel, nevertheless, perfectly satisfied, with deciding this question upon the general principles of law before stated, fortified by the circumstances of the absence of any contrary decision or *dictum*, to be met with in any book.

The transactions which have given rise to these suits, are marked by circumstances of such wicked atrocity, that it is impossible to think of them without feeling the deepest disgust and abhorrence. Regardless of their duty to their owners, to their country, and to their God—lost to all the feelings of justice, honour, and humanity—the persons engaged in these disgraceful robberies, were not satisfied with plundering these

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unprotected strangers; they even denied to the officers and crew of the Spanish ship, the liberty of seeking an asylum in the United States, where they might obtain the means of rendering their passage across the Atlantic, at that advanced season of the year, more comfortable and more safe, than it was likely to prove in their destitute and disabled condition. But concealment of their crimes, was to these men every thing; the comfort, and even the lives of those whom they had injured, nothing;—that the laws are incompetent to afford a suitable redress to the sufferers, is to be regretted. But let these foreigners remember, that this defect does not arise from any thing peculiar to the jurisprudence and laws of the United States; but that it is universal, and exists equally in their own, and every other country, where the civil and maritime laws prevail. The liability of those to whom they owe their wrongs, is admitted; their inability to make retribution, if such should be their situation, is a misfortune for which the tribunals of no country can supply a remedy. Those against whom the redress is sought, in this instance, did not commit, or in any manner authorize or countenance, the spoliation of which the libellants complain. They are, therefore, equally innocent with the libellants; and are equally entitled to the protection of the law. The government has done all that a just nation can be required to do, and all that our free Constitution would permit, to bring the principal offenders to justice. They have been prosecuted at the public expense; and the law officer of this Court, charged with the management of the prosecution, has faithfully and ably performed his duty. But a jury, selected according to the humane provisions of our laws, have acquitted them, upon evidence different from that which has appeared in these cases; and such as, we doubt not, that body most conscientiously thought was insufficient to warrant the conviction of the accused.

All, then, that remains for us, is to pronounce what we as conscientiously believe to be the law in these cases; which is, that the decrees of the District Court ought to be affirmed.

## GRAY vs. SIMS &amp; BETHEL.

**Insurance.** If the trade in which a vessel is to be engaged during the voyage, be contrary to the laws of the country, or the laws of nations, a policy upon the ship equally with one on the cargo, the peculiar subject of interdiction, is void.

The rule, that if the policy once attaches, the right to the premium becomes indefeasible, is not without exceptions.

If a contract of insurance be legal when it is made, and the performance of it is rendered illegal by a subsequent law, both parties are discharged from its obligations. In such a case, the insured loses his indemnity, and the insurer his premium.

**THIS** was a case reserved for the opinion of the Court, and is as follows.—On the 17th of December 1810, the plaintiff underwrote a policy for 5000 dollars, on two-thirds of the brig *South-Carolina*, belonging to the defendants, on a voyage at and from Philadelphia to Calcutta, and at and from thence to Philadelphia, with liberty to touch and trade at Madras, on her outward and homeward voyages. The vessel cleared out for Calcutta, from Philadelphia, and sailed on the voyage insured, in December 1810; and at Calcutta took in a cargo of British goods, one of the defendants being her supercargo and commander on her return voyage, and with that cargo returned to the United States. On her arrival, she was seized, with her cargo, on behalf of the United States; and the forfeiture, or alleged forfeiture, was afterwards remitted to the defendants and the other owners. This action is brought, to recover the amount of the premium. The jury found a verdict for the plaintiff, subject to the opinion of the Court on the above case.

J. R. Ingersoll, and Rawle, objected to the plaintiff's right of recovery, upon the ground, that the voyage insured was il-

legal; the Non-Importation Law being to take effect on the 2d of February 1811, unless Great Britain should, before that day, repeal her orders in council. They read the Acts of Congress of the 1st of March 1809; 1st of May 1810; and 2d of March 1811:—the President's proclamation of 19th of April 1809, reviving trade with Great Britain; of the 2d of November 1810, declaring that France had repealed her edicts:—1 Burr, 341. Park, 232. Marsh. 180, 1. 72. 66-8. 74. 57. 1 L. Ray. 724. Roccus, Note, 1. Bynk. B. 1. c. 21. 1 P. W. 185. 3 Vex. Jun. 373. 4 Dall. 269. 298. 308. 343.

Binsay, for the plaintiff, contended, that at the time this policy was underwritten, there was no law which forbade the importation of goods from British possessions; and that consequently, the policy having once attached, no future circumstance could affect it. The policy is on the vessel only; and the conduct of the insured in taking goods on board, contrary to law, cannot exonerate him from paying the premium. He cannot make a violation of law the ground of his defence.

WASHINGTON, *Justice*, delivered the opinion of the Court. This case presents a question somewhat novel, from the particular circumstances of it; although it is fully within certain well-established principles of law, by which it may, without much difficulty, be decided. The question is, whether the policy was void, upon the ground, that the trade in which this vessel, during the voyage insured, was to be employed, was, or might be forbidden by law. Before arriving at the immediate decision of this question, we lay down the following positions, which, if not admitted, may easily be proved. 1. That if the commerce in which a vessel is to be engaged, during the voyage insured, be contrary to the laws of this country or to the law of nations, a policy upon the ship equally with that upon the cargo, the peculiar subject of interdiction, is void. It is true, that the insurance upon the ship, is strictly an insurance upon the voyage, which, independent of the traffic in

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which she is engaged, may be perfectly lawful. But, if the traffic be forbidden by the laws of this country, the voyage, connected with such traffic, becomes on that account unlawful. The voyage is identified with the trade, for the sake of which it was undertaken; and the ship is the instrument with which the trade is carried on, and without which, the law could not be violated. The law, therefore, considers the ship, in *part delicto*, with the prohibited cargo; and a policy made upon her for the voyage, equally undeserving of its aid to enforce the performance of its stipulations.

In the next place, we take it for granted, that the object of this voyage, was the importation of goods from Calcutta or Madras into the United States; because it is inconceivable, that the owner of this ship would encounter the heavy expenses of an East India voyage, without a view to profit; which could only arise by bringing home, as he in fact did, a return cargo. There is no ground for presuming, that the intention of the owner was to trade between Calcutta and Madras, or any other ports; because the voyage insured, was from Philadelphia to Calcutta and back, merely with liberty to touch and trade at Madras, on the outward and homeward voyages. Any other trading, therefore, would have deprived the insured of the protection of the policy. If the real intention of the voyage can be discovered, either by the nature of it, or by other evidence, and the object appears to be an illicit trading, the legal consequence will be the same, as if it had appeared on the face of the policy. If, then, this policy had been effected after the 2d of February 1811, the case would have come precisely within the rule, which declares, that the law will not lend its aid to enforce the performance of a contract, made in contravention of its own regulations.

This leads immediately to the material question in this cause; does the above rule apply to the policy under consideration, the same having been underwritten a few weeks prior to the 2d of February 1811, and before the Non-Importation Law



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again into operation against Great Britain? The difference between a policy made prior to the 2d. of February 1811, and one made subsequent to it, is, that in the latter case, the subject of the contract was immediately and absolutely illegal; whereas in the former, the illegality of it depends upon a contingency. But nevertheless, the underwriter promises to the insured an indemnity against loss, upon a traffic which the laws of his country may forbid, and *whether it should be forbidden or not*. He engages to protect a trade, which is to be carried on in defiance of any law which may be passed to interdict it. And in this a contract which can show its face in a Court of justice; whose duty it is to enforce the laws of the country?

It was contended, with great ingenuity, by the plaintiff's counsel, that at the time this policy was underwritten, the importation of goods from a British port into the United States, was lawful; and consequently, that the policy having once attached, the right of the insured to the premium became perfect, and could not be defeated by any thing *ex post facto*. Now, it may safely be admitted, that the importation was lawful at the time this insurance was effected; and yet it will not follow, that the policy attached; or if it did, that the right of the insurer to the premium, could, under any possible circumstances, be enforced. The importation was lawful at the time the insurance was made; and yet the contract was illegal, because it stipulated to protect a prohibited trade. It was impossible, that an importation of goods from Calcutta could be made into the United States, within the period of time which would elapse between the 17th of December 1810, and the 2d of February 1811; and consequently, it was to be made after the latter day; and if it should then be prohibited, still, the underwriter was bound to indemnify the insured against all risks to which he might be exposed, in making such illegal importation. The contract was illegal, because it looked to a period beyond that when the importation might be contrary to law, and engaged to protect it, although such should be the case. The

policy, therefore, never did attach. Neither is it correct to lay it down as a general rule, without exception, that if the policy once attach, the right to the premium becomes indefeasible. It does so, we admit, notwithstanding any act of the insured, or of his agents. But if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligations. The insured loses his indemnity, and the insurer his premium. This is totally unlike the case of *Odlin vs. The Pennsylvania Insurance Company*;<sup>\*</sup> because, in that, the Embargo Law did not forbid, but only suspended, the performance of the contract. The voyage and trade were not condemned, but merely postponed.

It was contended by the plaintiff's counsel, that the contract should be construed to protect the importation, only in case it should be lawful; but not so, if it should be forbidden by the Non-Importation law coming into force. This would be to set up an implied warranty on the part of the insured, to destroy the protection which the policy promises him, and for which the premium was paid. A warranty which is totally inconsistent with the express stipulations of the policy, cannot, with any propriety, be implied. The insurer, in this case, engaged to indemnify the insured against all losses which might happen to the ship on her voyage. The object, therefore, of the insured, was to be protected on that voyage at all events; and the protection was expressly and unconditionally promised by the underwriter. The supposed warranty, therefore, would be entirely contradictory to the obvious intention of both parties; and for that reason it cannot be implied.

Upon the whole, we are of opinion, that the law is in favour of the defendants, and that judgment be rendered for them.

*Judgment for defendants.*

<sup>\*</sup> Vol. II. p. 312.

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 THE UNITED STATES vs. THE NANCY AND CARGO.  
 SAME vs. THE CARGO OF SHIP CAROLINE.

Information for a breach of the Non-Importation Law.

The prohibited articles, the importation or the putting on board of which, with intent to import the same, is made a cause of forfeiture by the 5th section of the Act of 1st March 1809, are, as well those which are prohibited on account of *the place* at which they were laden, as those which are the *growth, produce, or manufacture*, of the offending nation.

Although the merchandise, which is the subject of this information, was landed, and the duties paid thereon, at Amelia Island, in Florida, and thence trans-shipped to Philadelphia—yet, as the goods were originally put on board the vessel, with intention to import them into the United States, no question can arise as to the continuity of the voyage; the offence under the law consisting, not in the importation, but in the intention with which the merchandise was put on board.

The Non-Importation Law of 2d March 1811, which revived the Act of 1st March 1809, the provisions of which extended to the *possessions*, as well as the colonies and dependencies, of Great Britain, did not extend to the *possessions*, but only to the *colonies and dependencies* of that power. Malta was not a dependency of Great Britain.

*WASHINGTON*, Justice, delivered the opinion of the Court. These are informations, filed on behalf of the United States, against the brig Nancy and her cargo, and also against the cargo of the Caroline, for breaches of the Non-Importation Laws of the United States. The Nancy is claimed by an American citizen; and the goods in the two vessels are claimed by Willing & Francis, for themselves, and on account of certain persons residing at Malta.

The facts, in these cases, are—that the goods imported into the port of Philadelphia in these vessels, were shipped at the island of Malta, in the ship Union, by the Jurats of the University of the four Cities of Malta, some time in the month of

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February 1811, consigned to Willing & Francis at Philadelphia, to be sold by them, and the proceeds to be invested in a return cargo of flour. It appears, by the letters from the shippers of this cargo to their consignees, that in case the Non-Importation Law as to Great Britain should be renewed, the Union, with the cargo on board, was to be ordered to Amelia Island, where her cargo was to be taken out and replaced by a cargo of flour, which the consignees were to send forward to that place. On the 6th of May 1811, Willing & Francis received information of this consignment, and immediately sent orders to the master of the Union, who had then arrived on the coast of the United States, to proceed to Amelia Island; to which place, they informed him, they would despatch two vessels with flour, to load the Union, and also to receive her cargo to bring to Philadelphia. The flour was accordingly sent to Amelia Island in these two vessels, the Nancy and the Caroline, in which the cargo of the Union was imported into Philadelphia, some time in August 1811. A *pro forma* decree having been made by the District Court, dismissing the informations, appeals were entered to this Court.

The questions arising in these causes, are—1. Was the cargo of the Union, in whole or in part, the growth, produce, or manufacture, of the island of Malta? 2. Was the importation into the United States to be considered as having been made from that island, or from Amelia Island? 3. Was the island of Malta a dependence of Great Britain?

1. As to the first question, there can be no doubt, upon the evidence, that the articles composing this cargo are not produced in the island of Malta for exportation; and that this particular cargo was imported into that island from Italy and other places, not belonging in any respect to the British government.

2. In order to arrive at a clear understanding of the subject, to be considered under the second head of argument; it will be proper to take a brief view of the different Acts of Congress, which interdicted commercial intercourse between the United States and Great Britain.

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The Act of the 1st of March 1809, prohibits, after the 20th of May following, the importation into the United States, of any goods, &c., wherever grown or manufactured, from any port or place situated in Great Britain, or France, or in any of the colonies, or dependencies; or in the *actual possession* of either of these nations. It also prohibits the importation of any goods, being the growth, produce, or manufacture of those countries, or of their colonies, dependencies, or places, in their actual possession, from any port whatever. The 5th section of this law declares, that all such prohibited articles, imported into the United States, contrary to the true intent and meaning of the Act, or which should be put on board of any vessel, with intention of importing the same into the United States, together with all other articles on board of the same vessel, belonging to the owner of the prohibited articles; should be forfeited. The sixth section provides, that if the said prohibited articles should be put on board, with intent to import the same into the United States, with the knowledge of the owner, or master of such vessel, the vessel also should be forfeited.

The operation of this law as against Great Britain, was suspended for a short time, by the President's proclamation, issued on the 19th of April 1809, (5 vol. Am. Reg.) in consequence of the arrangement with Mr. Erskine; and was to take effect on the 10th of June following—and was again revived by proclamation, dated the 9th of August 1809. But it at length expired, by its own limitation, in May 1810, no law having been passed, during that session, further to continue it.

By the Act of the 1st of May 1810, it was however declared, that in case either Great Britain or France should, before the 3d of March 1811, so revoke or modify her edicts, as that they should cease to violate the neutral commerce of the United States—which fact, the President was to declare, by proclamation; and if the other nation should not, within three months thereafter, do the same thing, in relation to her edicts, that the 2d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 18th sections of the

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Act of the 1st of March 1809, should, from the expiration of the said three months from the date of the said proclamation, be revived against the dominions, colonies, and dependencies, and the articles the growth, produce, or manufacture of the dominions, colonies, and dependencies of the nation so refusing, or neglecting to revoke, or modify her edicts; and that the restrictions imposed by this Act, (which relate only to the prohibition of our waters to the armed vessels of those two nations,) should, from the date of the proclamation, cease, in relation to the nation so revoking her decrees.

On the 2d of November 1810, the President issued his proclamation, declaring that France had complied with the conditions of the law of the 1st of May 1810; in consequence of which, the above sections of the Act of the 1st March 1809, were brought into operation against Great Britain, *her colonies and dependencies*, to take effect from the 2d of February 1811, unless, before that time, Great Britain should repeal her offensive edicts. Then came the Act of the 2d of March 1811; which enacted, that until the President should, by his proclamation, declare, that Great Britain had revoked, or so modified her edicts, as that they had ceased to violate the neutral commerce of the United States, the provisions of the above sections of the 1st March 1809, should have full force, and be immediately carried into effect against Great Britain, *her colonies and dependencies*.

From this view of the above laws, the two following positions appear to the Court to be perfectly clear; 1st, that the prohibited articles, the importation of which, or the putting on board of which, with intention to import the same into the United States, is made, by the fifth section of the Act of the 1st March 1809, a cause of forfeiture, are, as well those which are prohibited on account of the *place* at which they were put on board, as those which are the growth, produce, or manufacture of the offending nation. The object of the law was to interdict all commerce with the ports, as well as in

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the products of Great Britain and France, so far as related to importations into the United States; and a violation, or intention to violate this policy of our government, was, in reason, as well as by the plain construction of the law, made punishable in either case. If then the island of Malta should be determined to be a prohibited place, and the intention of the owners of this cargo, at that place, was to import the same into the United States; or, without such intention being proved, the importation was made, either directly or indirectly; the forfeiture was complete, as soon as the cargo came within the jurisdiction of the United States, notwithstanding the landing, and paying of duties, at Amelia Island, and the trans-shipment at that place, for the port of Philadelphia. In the latter case, that is, of an original importation, from Malta to Amelia Island; there can be no doubt, but that if the cargo had been *bona fide* sold at Amelia Island, the purchaser might have imported it into the United States, without incurring a forfeiture; because the continuity of the voyage, from the forbidden place, would have been substantially broken, and not in form merely. Contrivances to evade a law, may sometimes be so deeply laid, as to elude detection, notwithstanding the strictest examination of all the circumstances that can be brought to light. But whenever it is made clearly to appear, that the law, in its obvious spirit and intention, has been violated by covert means, a court of justice would forget its duty, by affording its sanction to such contrivances. But, when it appears, that the cargo was originally put on board, with intent to import the same into the United States, no question, it is conceived, can arise, as to the continuity of the voyage; for here the offence consists, not in the importation, but in the intention with which the cargo was put on board. Now, as to the facts in this case, there can be no doubt. The letters from the owners at Malta, to their consignees, and from those consignees to the master of the Union, and to their agent at Amelia Island, as also to the person whom they sent in the Nancy—all prove clearly, that the cargo was put on

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board at Malta, with an intention to import the same into the United States; directly, if the laws would permit; and if not, then indirectly, by trans-shipping it at Amelia Island.

The second position which arises out of the view before taken, of the different Acts of Congress on this subject, is, that the Non-Importation Law of the 1st of March 1809, which interdicted commerce with the *possessions*, as well as with the colonies and dependencies of Great Britain, was revived only against that nation, her colonies, and dependencies; and this conducts us to the third and most difficult question in the cause. Is Malta to be considered as a dependence of Great Britain?

In deciding this question, the Court has not had an opportunity to derive much information from books. The precise meaning of the word *dependency*, as it is used by Congress, in the law under consideration, cannot be ascertained with any degree of certainty. It may, however, be safely concluded, that it imports some civil and political relation, which one country bears to another, as its superior, different from that of a mere possession. The introduction of the words "actual possession," into the Act of the 1st of March 1809, and the omission of them in that of the 1st of May 1810, afford strong evidence, that Congress did not consider a *dependency*, as synonymous with a *possession*; but, on the contrary, the difference was so material, as to induce Congress to sanction a trade with the former, which had been previously interdicted with both. As soon as this distinction is established, the mind of a legal man is irresistibly led to annex to the one, the idea of possession, accompanied by title, in opposition to a mere naked possession, obtained either by force, and against right, or rightfully acquired, and wrongfully withheld from the legal sovereign; and this, the Court is strongly inclined to think, is the true definition of a dependency;—that is, a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations



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war, and not a dependency—durably, legally, and indisputably attached. The dominion is only temporary, and it cannot be considered as a national territory and domain, being held on condition, and not in perpetual right. Vattel is full upon this subject. "Immovable lands, towns, provinces," &c. he says, "pass under the power of the enemy, who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the state to which these towns and provinces belong, that the acquisition is completed, and the property becomes stable and perfect." B. 3. c. 13. s. 197. So also s. 198. See also Puff. B. 8. c. 6. s. 20.

It is not within the province of this Court, to settle disputed rights between nations. But it is under the necessity of expounding laws, and of discovering, for our guidance, the meaning of the terms in which they are expressed.

The Court has not had an opportunity to enter into a minute investigation of the actual or political state of the island of Malta. But, on a general view of the books which detail its history, from the time it was invaded by the French, until the period when this shipment was made, it does not seem to have been at any time permanently or rightfully incorporated with the domains of Great Britain. It continues a possession, gained by conquest from France, and not from the people or ancient government of the island; and consequently, the law of nations imposed an obligation upon the conqueror to restore the island to the people, and not to bring it under subjection to a new master. Vatt. b. 3. c. 13. s. 203. The island appears to be under a military government, notwithstanding the commander is styled "civil governor," or "commissioner;" and the officers of police, and a Judge of the Admiralty, are appointed by the military and civil governor: see Eton's Materials for a History of Malta, p. 89. The ancient laws of the island, executed by native magistrates, are yet in force—as is often the case in conquered countries, held in temporary subjection. No doubt, these magistrates are subject to the power and control of the occupant

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by conquest, for the time being. But the natives have never ceased to claim an independent right to the government and soil; although, from a detestation of their former oppressors and perfidious betrayers, the Knights of St. John, they have frequently requested, and have as often been denied, the privileges and laws enjoyed by British subjects.\* Nothing shows more strongly that they are not considered by Great Britain herself as part of her subjects, or the island as part of her territories.

By the treaty of Amiens, (after the offer of the Maltese to place themselves under the British government,) the British administration agreed to re-deliver the island to the *Knights*, contrary to every stipulation, actual or implied, with the *inhabitants*.† This was a breach of confidence, palliated by her own writers only on the principle of expediency, and the advantages to be derived to England, either positively, or as a prevention to its falling into the hands of the French, to whom the Knights were alleged to be devoted. Still, however, Great Britain bound herself, by this treaty, to abandon any claim she might have acquired to the island, and to restore it to its ancient government. After this, her title by conquest, imperfect and defeasible as it was, changed entirely its character. Before this agreement to restore the island, she had but a mere possession; but that possession was rightful—the continuance of it, after the treaty, was wrongful.

Under all these circumstances, the Court is of opinion, that the island of Malta has been, and now is, held by Great Britain, by force, without right, in direct contravention of a solemn treaty. It is not the period, long or short, of such forcible possession, but the stability and right of the occupant, which, in the opinion of the Court, will satisfy the true meaning of the term *dependency*. It is only a foreign possession, without certain permanence or settled right.

*The decree of the District Court affirmed.*

\* See Pasley, pp. 306. 390-1. 31. Memorial of the Maltese Deputies.

† Quarterly Review, for 1813, pp. 4, 5.

## WALDEN vs. CHAMBERLAIN.

Libel on a hypothecation bond, executed by the former master of the vessel at Calcutta, the Aurora being about to proceed to Philadelphia. The captain chartered the vessel to the libellant, for the voyage to Philadelphia, under another master; and at the same time executed the bond, part of the consideration of which was to obtain funds for the payment of a hypothecation of the vessel at Port Jackson, (of the necessity of executing which, there was no proof,) and part for repairs to be made of the vessel at Calcutta.

The payment of the hypothecation given at Port Jackson, is not a valid consideration for the bond executed at Calcutta, as there is no proof of the necessity for executing it.

The obligee in a bottomry bond ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage: the necessity for such advances, and that they were made on the credit of the vessel, are never to be presumed. If the master has or can command other funds, he has no authority to subject the property of the owner to the payment of a premium beyond legal interest.

Another conclusive objection to the validity of this bond, is, that before the advance was made and the bond given, the master had resigned his command of the vessel, and another master, appointed by the libellant, had succeeded to it.

**THIS** is the case of a libel filed in the District Court by the appellees, stating, that the brig Aurora, being in the year 1811 at Port Jackson, in New South Wales, and being in want of necessaries for the prosecution of the residue of her voyage; none of her owners being there, O. Smith, the master, having no other means to obtain money to enable him to prosecute his voyage, borrowed of Lord & Williams, for this purpose, 1482l. 6s. 1½d. sterling, on a bottomry hypothecation of the said brig, her tackle, &c. at a premium of 10 per cent. for the voyage from Port Jackson to Calcutta;—that the brig arrived in safety

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at Calcutta, and the libellants being willing to charter the brig, to bring out a cargo to the United States, which she could not do, being again in want of necessaries to enable her to prosecute such voyage, and to free her from the bottomry to Lord & Williams; the master applied to them for a loan of money for these purposes, which they granted him to the amount of 18000 Sicca rupees, for which they took a bottomry bond on the said brig, on a voyage from Calcutta to Philadelphia, at the rate of 30 per cent. premium; which bond was executed by said Smith, on the 23d of December 1811;—that the libellants accordingly paid off the amount of the bottomry bond to Lord & Williams, amounting to 10713 Sicca rupees, 2 annas, and received the said bond from the agent of Lord & Williams, with a receipt thereon;—that the brig arrived in safety at Philadelphia, whereby the said sum of 18000 Sicca rupees, with the stipulated premium, became due. The prayer of the libel is, that the brig may be seized, and condemned to be sold, for payment of this debt.

The answer of the owners of the brig, not confessing any of the allegations of the libel, states, that on the 23d of December 1811, the said Smith chartered the said brig to the libellants, for the voyage from Calcutta to Philadelphia, for the sum of 12000 Sicca rupees, which the libellants agreed to advance to the said Smith, as soon as the cargo should be laden on board; and it was further agreed by the charter party, that the libellants should hold the entire possession and command of the brig, during the continuance of the charter party, and should navigate her to the United States;—that the said Smith had no authority from the respondents, to enter into the said charter party. Nevertheless, the libellants took possession of the brig, paid the said freight to Smith, and dismissed him from the command of the brig; and placed her under the command of another master, who navigated her to Philadelphia;—that the libellants paid the said freight to Smith, knowing that he was addicted to intoxication and profligacy, instead of ap-

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plying the same to the necessities of the vessel; no part of which, has Smith paid or accounted for to the respondents. They aver, that the whole 18000 rupees, were advanced without any justifiable cause whatever.

The District Court confirmed the claim of the libellants, to the amount of the Port Jackson bottomry, as well as to the residue of the consideration of the bottomry bond given at Calcutta; deducting from the 18000 rupees, the 12000 rupees paid by the libellants to captain Smith, considering that that sum should have been applied to the necessities of the vessel, and not paid over to Smith; and decreed in favour of the libellants for the balance.

Chauncey, and Binney, for the appellants, contended, that this was not a good maritime hypothecation; the bond given at Port Jackson, which forms a part of the consideration of it, not being proved to have been given for necessities for the vessel, nor given at the time the advances were made, or in consequence of an agreement to give such a security at the time the advances were made; nor was it given to enable the master to complete his voyage, as described by his owners, that being to Canton, and not to Calcutta; and consequently, it was not given with a view to the interest of the owners; all which circumstances should concur, to make a valid maritime hypothecation. Park, 413. 2 Marsh. 740, Cond's ed. 1 Note. 2 Peters's Adm. Rep. 300. Bee's Rep. 120. 131. Ld. Ray. 157. 346. 2 Brow. Adm. Law, 124.

As to the residue of the consideration, the 12000 rupees paid for freight, furnished funds for the supply of necessities at Canton, and the obligee should have so applied them. Again, the bond should express that the money is loaned for the necessities of the ship, or it is not good. 2 Emerigon, 434. 439. 2 Marsh. 740, Cond's ed. Another objection was made, that Smith was not master when he gave the bond; and of course, could not bind his owners by it.

Hopkinson and Rawie for appellees. The bond is *prima facie*

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evidence, that the advances were made for the necessities of the vessel; besides, it is proved, by a witness, that the vessel required, and received repairs at Port Jackson, though the amount expended for them is not proved. So, it is to be presumed, that a promise to secure advances made for the necessities of a vessel, was made when the advances were made. As to the form of the bond, this is not objectionable. Abbot, 103. 299. 1 Rob. 173. 176. 2 Em. 9.

But the powers given to the master by his letter of instructions, authorized the master to bind the owners, by giving a security on the vessel, in cases where, as master, he might not have had such authority. These instructions state, that he is to proceed with his cargo, amounting to 8927 dollars, to the coast of Brazil; there to sell, and take on board another cargo, and to proceed with it to New-Holland; and there to sell the second cargo. Having thus got on board furs, specie, or good government bills, to proceed to the Pegus, and load with sandal wood; and if this can be got, to proceed to Canton. If only part of a cargo can be obtained there, he is to proceed to the Sooloo Islands or others, for trade in pearls, birds' nests, and other articles, suited for Manilla or Canton; "at one of which ports," they say, "we expect you to close the first part of your adventure, by remitting to us all the funds accumulated, reserving only enough for your operations in those seas. The first adventure being thus ended, we leave to your judgment the future destination of the brig, and the kind of trade proper to be adopted—either to continue trade to the Pegus, Sooloos, or other islands, or to engage in trade between Canton and the north-west coast of America; but Canton should be the place to conclude all your adventures. Finally, notwithstanding all that is stated, as orders, we do not intend to embarrass your proceedings in any way; and therefore, confiding in your judgment, we leave you free in all situations, to act as you may think best for our interest. We will add, however, that you have no authority to draw on us, nor to negotiate for us, farther than

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as relates to the vessel, cargo, and proceeds thereof, in your hands; so that in any event, you are not to engage us in any responsibility. Hence, the negotiating the bills, as well as every other transaction during the voyage, must be done on your responsibility only, as though you were the owner of vessel and cargo. You will understand, that we are known to you only as persons with whom you are hereafter personally to account for the property now embarked in vessel and cargo, and are not to be made responsible for any thing more."

*WASHINGTON, Justice*, delivered the opinion of the Court. The question which arises in this case is, whether the bond given at Calcutta, constitutes a valid hypothecation of the vessel? To decide this, the consideration of the bond, and the circumstances under which it was given, must be inquired into. The legal principles which apply to maritime hypothecations, have been frequently stated in this Court. It has been laid down, that to give validity to such a bond, the necessity of raising money in this way, should be clearly shown by the obligee; and it should also appear to have been obtained, in order to enable the master to prosecute his voyage. If the master has, or can, command other funds, he has no authority to subject his owners' property to the payment of a premium, beyond the legal interest of money. It is also necessary, that the loan should be made upon the credit of the vessel, and not that of the master or owner; because in the latter case, the necessity for giving such an hypothecation, could not exist. Consequently, the master has no authority to hypothecate in this way, for antecedent advances made, not upon the faith of such a security.

How do these principles apply to the consideration of the bond given to the libellants? That is composed of a bottomry bond, given by captain Smith to Lord & Williams, at Port Jackson, which was discharged at Calcutta by the libellants; and of advances made by the libellants to captain Smith, at Calcutta, for the purpose of enabling the *Aurora* to perform



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her voyage to the United States. No evidence has been offered to prove the consideration for which the Port Jackson bond was given, except a general statement made by Clark, in his deposition, that the brig was in want of necessaries at that place, and that she received repairs there. But no account is furnished, nor proof exhibited, to show, whether the whole, or what part of the consideration of that bond, was required for the necessities of the vessel, or that they were such as might probably require such a sum to relieve them.

This, however, is not the objection which we deem most fatal to this bond. It does not appear, that the loan was made on the credit of a hypothecation of the vessel; and unless it was, the master had no authority to bind his owners or their property, by giving such a security. It is contended, that this ought to be presumed, the bond itself being *prima facie* evidence of that fact. However this might be, in a case fairly open to presumption, the argument is inadmissible upon general principles, where the recitals in the bond contradict the presumption. Now, in this case, it is expressly stated in the bond, that the necessaries for the Aurora, had been furnished at various times and places, as well previous to her sailing from Port Jackson, in September 1810, as at various times since; and also, on the present voyage. Where the advances are made at one time, and the security is taken long afterwards, particularly after the vessel has been exposed to sea risks, by having performed an intermediate voyage, as happened in this case, the presumption is, that the advances were made on the personal credit of the master or owners, or else the security would have been taken at or about the time when the debt was incurred. But there is no room for presumption, in this case, for another reason, which is, that it is proved by Clark, that captain Smith was imprisoned for the debts he had incurred on account of the vessel; and also, that the brig received nearly all the repairs put upon her, before the first voyage which she made from Port Jackson. This evidence shows strongly, that the master had

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obtained from other persons than Lord & Williams, what articles were necessary for his vessel, upon his personal responsibility; and that the advances made by Lord & Williams, were not to enable the vessel to prosecute her voyage to Canton, but principally to relieve the captain from confinement, and to enable him to accommodate Lord & Williams, by transporting a cargo for them to Calcutta.

As to the advances said to have been made at Calcutta, to captain Smith, for the necessities of the *Aurora*, to enable her to perform a voyage thence to the United States, many reasons have been assigned, why they cannot constitute a consideration for a maritime hypothecation. One of them, we think, is conclusive; and consequently, the others need not be examined. No person is authorized to give such a bond, but the master of the vessel; and it is most obvious, that on the 23d of December 1811, when this bond bears date, Lee, and not Smith, was the master. It is impossible to be so blind, as not to see that the bond and charter party, though dated on different days, were simultaneous, if not in their execution, at least in relation to the contract which formed the basis of those instruments. The circumstance which proves this fact incontestibly, is, that captain Lee, (the master appointed by the libellants, and not substituted by Smith,) both by his affidavit, and by his account of the disbursements made for the vessel at Calcutta, proves, that he assumed the command on the 17th of December, six days before the bottomry bond bears date, and before any advances even were made for the necessities of the vessel. These advances, therefore, were made to a master appointed by the very persons who made them, and not to the one who hypothecated the vessel. The affectation of Smith, in giving sailing instructions to Lee, in January 1812, is too thin to conceal the real nature of this transaction.

If, then, this be not a valid hypothecation, under the general authority of Smith, as master, is it so in virtue of any powers given to him by the instruction of his owners? These instruc-

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tions contemplate two objects—the employment of the vessel, and the means of accomplishing it. As to the first, the powers given to Smith were unlimited. The voyages marked out by the owners, seem to have been intended merely as hints, suggested in the way of advice; and lest he should be led to construe them otherwise, the writers add the following explanatory clause—“Finally,” &c.—see *ante*. Seeming, however, to apprehend, that this sweeping sentence might be understood to extend to the means of accomplishing the objects of the trade, in which he was to engage, they express themselves immediately as follows.—“We will add, however,” &c.—see *ante*. This latter clause, is to be considered rather as a limitation, than an extension of the authority which, as master, Smith would have possessed. As master, he would have had power to bind, not only the vessel and cargo by an hypothecation of them, but also the owners personally, which latter power is here denied him.

The authority, therefore, of Smith, to hypothecate the vessel, remained precisely as it stood under his general authority as master; and not only so, but it was connected with his character as such. The moment he threw off that character, or bound himself to do so, and resigned the management of his vessel to another master, his power to bind his owners, or their property, in virtue of his instructions, as well as of his general authority as master, ceased; and although the libellants may have a very just claim for advances fairly made for the use of this vessel, and in order to enable her to return to the United States, yet it is not such a one, as a Court of Admiralty can enforce.

*Decree reversed, with costs and libel dismissed.*

*Affirmed, on an appeal to the Supreme Court.*

## CAZE &amp; RICHARDS vs. REILLY.

The schooner Julia, on her voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, he, with the advice of the officers and crew, ran her on shore at Long Branch, in New-Jersey; and before the enemy could board her, a large part of the cargo was saved; after which she was burnt. The master claimed to retain the goods saved, as subject to *freight, general average, and expenses.*

The Rhodian law *de jactu*, is the parent of the law of maritime contribution. The principle to be deduced from the Rhodian law, and from the general maritime law of nations, is, that if the cargo or ship, or any part of either, be *voluntarily* sacrificed, or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made be attained.

An intention to commit to inevitable loss goods thrown overboard, forms no part of the reason assigned by the Rhodian law for contribution; and is not necessary to authorize the claim.

The object always is, to incur a partial loss, and to risk a minor or contingent danger, to avoid the more probable or certain loss of the whole.

It is sufficient to justify a claim to contribution, if the danger sought to be avoided be so imminent, that the measure adopted may be beneficial to all.

If the exposure of the vessel be made for the common safety, and be successful in relation to a part of the cargo, it is immaterial whether her total loss was produced immediately by the standing, or consequentially, by placing her in a situation which effected her destruction.

If the ship be lost, there can be no contribution, because the object for which the jettison was made was not attained. In case of a general shipwreck, there can be no contribution, because it was not voluntary.

**THIS** was a replevin, to recover a quantity of goods saved from the wreck of the Julia. The following case was agreed to stand for a special verdict. The schooner Julia, owned by the defendant, and laden with a cargo of merchandise, depart-

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ed from Bordeaux on the 23d of February 1813, bound for Philadelphia. On the 8th of April in the same year, while proceeding up Delaware bay, she was chased by a frigate of the enemy, then forming the blockade of that bay and river, and was compelled to bear away for New-York. The chase continued in the direction of New-York until the 9th of April, when a seventy-four of the enemy endeavoured to cut the schooner from off the land, and not succeeding, joined the chase; but having gone so far on her course as Long Branch, in New-Jersey, the schooner was headed by another frigate of the enemy. The master then deliberated, and consulted with his officers and crew, and by their advice, for the purpose of avoiding capture, and for the common benefit of all concerned, voluntarily ran the schooner on shore at Long Branch aforesaid. After saving sundry cases and packages of merchandise, and part of the furniture and rigging of the vessel, the enemy compelled the master, officers, and crew, of the schooner, to leave her; and then boarded, set fire to her, and left her. On the 10th of April, the schooner having burned to the water's edge, the master and officers, with the assistance of sundry fishermen, succeeded in saving other parts of the cargo, together with several spars, anchors, and other parts of the vessel's furniture and rigging; but so much of the hull, as was not burned, was washed upon the shore and lost. The merchandise saved, consisted of such dry goods as lay near at hand, and could be gotten out before the enemy boarded; and such wines, brandies, and other articles not liable to injury, as were in the bottom of the schooner. The gross value of the schooner at the time of said stranding, was 10,000 dollars. The gross value of her entire cargo, at the same time, including duties and freight, amounted to 101,193 dollars. The duties would have been 19,950 dollars. The gross freight of the whole cargo was 12,745 dollars. The value of the tackle and furniture of the vessel saved, amounted in gross, to 752 dollars. Expenses of saving, 262 dollars. The value of goods saved, gross, was 51,468

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dollars, including duties, 8622 dollars. Other expenses 1504 dollars, and freight. Value of freight saved, 4736 dollars. The plaintiffs' goods saved, amounted, gross, to 10,727 dollars, on which the duties were 1531 dollars; freight, 367 dollars; and expenses of saving, 187 dollars. The defendant, as owner of the vessel, detained the plaintiffs' goods for freight, general average, and expenses, after the plaintiffs had tendered a sufficient sum to cover freight and expenses, but not general average. He afterwards, at the request of the plaintiffs, sold them at public auction; and delivered over the proceeds, after retaining 4300 dollars, a sum deemed sufficient to cover the general average.

The questions submitted to the Court are—1. Whether the goods of the plaintiffs, which were saved, as above, are bound to contribute to the loss of the schooner by way of general average? 2. Whether they are bound to contribute to the goods and freight lost, or either of them, by way of general average? If the Court shall be of opinion, upon either of these points, in the affirmative, judgment to be entered for the defendant; and the parties to abide by an adjustment of the general average, made by such person, and on such principles, as the Court shall direct. If the opinion should be in the negative on both points, judgment to be entered for the plaintiffs; and the amount due by the defendant to the plaintiffs, if any thing, to be settled by referees to be appointed by the Court.

The first question only was argued. Duponceau, for the plaintiffs, cited the following cases, to prove that where the ship is lost, it is not a case of general average. Park. 170, 171. 1 East. 120. Weynsteen, 218. Rhod. Law. 3 Law Journal, 14, 15, 16, 17, 18, 19. Bynk. 424. 1 Mag. 52, 53. 64. Sea Laws, 336. 2 Vat. 173. 204. 209. 205. 165. 168. Spanish Ord. 179, 180. Vinn. 202. Marquard, s. 36. Loccienus, 1006. Kurick, 787. 788. Am. Lex. Mercat. 286. 4 Prussian Code, 218. 226.

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s. 1820, 1821. 2 Mag. 97. 332. 1 Em. 614. 616. 408. 9 Johns. 9. Poth. on Average, s. 113, p. 106.

To prove that the Sea Laws contain a spurious statement of the Rhodian Law, *de jactu*, and that the only true statement of it is in the digest, as set forth in the 3d Am. Law Journal, 14 *et seq.* he cited, 2 Bynk. Works, 89, c. 8. 1 Azuni, 282.

Binney and Chauncey, for the defendant, cited the following cases, Abbot, 331. 333. 375. Sea Laws, 93. 104. 107. 110. 135. 2 Magens, 15. 200. Voetius. 690. 2 Brow. C. & A. L. 199. 1 Emerg. 602. 612. 408. Roccus, N. 60. 99. 2 Marsh. 337. Gurdon. c. 3. 1 Emerg. 615.

The second question was not argued, and of course no opinion was given on it.

*WASHINGTON, Justice*, delivered the opinion of the Court. It seems to be universally admitted, that the Rhodian law, *de jactu*, was the parent of maritime contribution. That law, however, provides only for certain cases, in which contribution is to be allowed, and does not lay down any general rule. But it recognised, in relation to maritime contribution, a great and striking principle, within the equity of which, every possible case of contribution may by fair deduction be brought.

This law declares, "that if goods be thrown overboard, for the sake of lightening the vessel, as it is done for the good of all, all must come into contribution for the same." The principle of this rule is, that where a common benefit is received, by the voluntary sacrifice of a part, the loss sustained should be borne by the property saved. And although no other case is provided for, but the jettison of goods, and partial injuries to the vessel, yet the principle being a voluntary sacrifice for the common safety, contribution to repair the loss sustained, is equally within the equity of the law.

The ordinances of other countries, having the Rhodian law for their basis, and the construction given to that law, by learned jurists, have extended the principle of it to so many cases

of contribution, that it could scarcely have been supposed that one could arise, which had not been provided for. Thus, if the ship and cargo be ransomed from pirates, by a sacrifice of part of the cargo, or by a ransom bond—if, in the act of making a jettison, the ship, or other parts of the cargo receive injury—if the goods are not consigned to apparent destruction, but are put into lighters, for the relief of the ship, and the lighters perish—if the ship be damaged, by cutting the cable and masts, whereby she incurs a loss for the common good—or, if the deck or sides be cut, in order to facilitate a necessary jettison—These, and many other cases, which might be enumerated, are considered as cases of contribution, by all the maritime countries of the world. But to constitute a claim to contribution, the jettison must be designedly made, with a view to the common safety, and must be successful, at least in part; for if the ship be lost, by the peril which the sacrifice was intended to avert, there is no contribution due. The principle fairly to be extracted from the general maritime law of nations, upon the subject of contribution, is, that if the cargo or ship, or any part of either, be voluntarily sacrificed, or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made was obtained. This principle is not inconsistent with the rule contended for, by the plaintiffs' counsel, that if a jettison be made, and the ship saved, there shall be contribution; but if the ship be lost, there shall be none. That rule is correct in all its parts, when applied to a mere case of jettison. But the principle of it is equally applicable to a loss voluntarily incurred by the ship, for the common safety, if safety be thereby attained.

Let us now examine the correctness of the principle—1st, by the reason of it; and 2d, by authorities.—

1st. The reason assigned in the Rhodian law, why contribution should be made, in case of a jettison of goods, is so entirely applicable to that of loss, or injury incurred by the ves-



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sel, under the same circumstances, that it becomes those who would distinguish them, to point out the difference. That reason is, that all should contribute to a loss, occasioned by the jettison, for the sake of lightening the vessel, because it was done for the benefit of all. If so, and the ship expose herself to loss, for the sake of obtaining safety for all, and in consequence of such voluntary exposure, she is lost; why should not all contribute to repair the loss?

The reasons assigned by the plaintiffs' counsel, are, that the loss of the vessel was not contemplated, as the consequence of the stranding; that the act of stranding, exposes the common interest equally to destruction; that it cannot be certainly ascertained, that the loss of the ship resulted from the stranding; and, lastly, that the principle of contribution, the safety and prosecution of the voyage, cannot be effected, if the vessel be totally lost. Let these reasons be examined in detail:—

1st. The loss of the vessel was not intended. An intention to consign the goods thrown overboard, to inevitable destruction, forms no part of the reason assigned by the Rhodian law for contribution; and was not considered to be deducible from it, by those jurists who undertook to apply that law to other cases of contribution; otherwise, goods put into lighters, could never be entitled to contribution. As to these, the probability is, that they will be saved. The plaintiffs' counsel contends, that this is an excepted case; but he has not shown it to be so, and it is clearly within the reason of the general principle. So, injury sustained by the fall of a mast, is contingent, and not foreseen or intended. Even goods thrown overboard may be saved—and if saved, they belong to the owner at the time of the jettison—if not saved, the loss is to be repaired by contribution. The truth is, that it is the motive for the act, in relation to the rest of the property, and not the intention of the jettison in relation to the fate of the thing sacrificed or exposed to danger, which gives rise to the law of contribution.

2d. The stranding exposes the cargo, as well as the vessel,

to the risk of loss. If this reason were sound, then, a vessel stranded with a view to the common safety, would not be entitled to contribution, even for the purpose of repairing and floating her, if her situation admitted it; and yet it is clear, that by the universal maritime law, the expenses incurred for these purposes, are a subject of general average. But if this reason were admitted, it might produce very unsatisfactory results; for, it cannot be said, with any degree of confidence, that the loss of the anchor by the cutting of the cable, or the loss of the masts, may not expose the whole to danger. But the object is to incur a partial loss, and to risk a minor or contingent danger, to avoid the more certain loss of all. And this applies strictly to the voluntary stranding of the ship. Injury to her is certain—a total loss probable. The escape of the persons on board, from the dangers of the storm or of an enemy, and the safety of the cargo, if not certain, are considered to be more so than by continuing at sea; and with this calculation the measure is adopted. A certain injury, therefore, with a probable total loss, is voluntarily incurred by the ship for the common safety; and consequently, she is entitled to contribution.

3d. It cannot be certainly ascertained, whether the loss of the ship resulted from the stranding, or from some other cause. Neither can it be certainly ascertained, that the loss resulted from that cause, in case the damage sustained should be short of a total loss; in which case it is throughout admitted, that such damage must be repaired by a general average. It is sufficient, if the danger sought to be avoided, be so imminent that the measure adopted may be beneficial to all. Besides, the difficulty of proving that the immediate loss resulted from the stranding, would afford an insurmountable objection to the reason here assigned. For, although she may be burned, as she was in this case by the enemy, or may lie on the strand exposed to subsequent tempests, still, it would be impossible to say, whether her loss was not irremediable independent of these new causes. If the exposure of the vessel be made for the

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common safety, and be successful in relation to a part of the cargo, it is of no consequence whether her total loss was produced, immediately, by the stranding; or consequentially, by placing her in a situation by which her destruction was effected.

4th. It is contended, in the last place, that the principle upon which contribution is allowed, is the safety and prosecution of the voyage; which cannot be effected if the vessel be totally lost. This reason appears to be entirely fanciful; it has no authority of any kind to rest upon; and is inconsistent with other cases where the vessel is lost, and yet contribution is allowed. It can scarcely be denied, that the cases of such imminent danger as to justify the desperate remedy of stranding the vessel, the great object of all the parties who advise the measure, must be, first, the preservation of the lives or the liberty of those on board; and in the next place, the safety of the cargo, and possibly of the vessel. All hope of the further prosecution of the voyage, must in general be abandoned; although there is a possibility that it may be resumed. But, if this reason be a sound one, what will be said in a case where a portion is made of the whole of the cargo, or so great a part of it as to render the further prosecution of the voyage not worth pursuing? The voyage would be lost to all the parties concerned; and nothing would remain for any of them, but a compensation by way of general average, which might as well be adjusted at the nearest port, without the formality of proceeding unnecessarily to the original port of destination. And what seems to be conclusive is, that if the ship survive the danger which the portion was made to avert, and is totally lost at the next day, the goods saved shall contribute to the loss of the part thrown overboard, notwithstanding the entire destruction of the voyage. The owner of the goods saved, might, with equal propriety, in that case, as in this, complain that he should be called to contribution, when, by the loss of the vessel, the voyage is terminated, and the object for which the sacrifice was made, eventually defeated.

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Second: We now proceed to examine the authorities, premising that they ought to be strong and uniform, to bear down the reasons upon which the equity of contribution is founded, in a case like the present:

The Ordinance of Louis XIV., s Valin, 1480ss. 287, 209, enumerates, in the 6th article, five distinct cases of contribution; amongst which, is the expense of lightening and getting the ship afloat; and the ~~same~~ <sup>author</sup> declares, that if the ship be opened in order to draw out the goods, these goods shall contribute to the repairs of the damage ~~that~~ <sup>thus</sup> occasioned to the ship. It is to be remarked, that this Ordinance does not, in any part of it, notice the case of a voluntary stranding of the ship. But Valin, in his Commentary, states, that if to avoid a total loss by shipwreck or capture, the master runs his vessel ashore, the damage which he shall suffer at that occasion, and the charge of getting her afloat again, are general average, all having been done for the common safety.

The argument founded upon this Ordinance, and upon the comments of Valin, is, that as the expenses incurred for repairing the vessel and getting her afloat, are ~~done~~ <sup>provided</sup> for; and since all the foreign Ordinances agree in this, that unless the ship be saved, there shall be no contribution; it follows, that if the vessel, in consequence of a voluntary stranding, be totally lost, the law of contribution ceases; the rule "ave what save can," or in other words, "every man for himself" applies. Now, this conclusion is altogether inadmissible. The enumeration of certain cases, to which a general principle is applied, can never exclude any other case which may fairly be brought within the same principle. On the contrary, the rule is, that where there is the same reason, there is the same law. If the damage which a vessel sustains by a voluntary stranding for the common advantage, although that damage should be nearly equal to the value of the vessel, is declared to be a case of contribution; the reason which dictates

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such a law, will command the extension of it to the case of a total loss of the vessel.

As to the rule contended for, that there can be no contribution where the vessel is lost, it is totally misapplied in this argument. It relates altogether to an ineffectual jettison, and to a general or involuntary shipwreck. In the first case, if the ship and the remainder of the cargo, for the preservation of which the jettison was made, be lost, and the goods thrown overboard, or put into lighters, be saved, there can be no ground for contribution; because the jettison was made, not for the sake of those goods, but for the safety of the ship and the rest of the cargo. But, if the object of the jettison be attained by the safety of a ship, at the expense of the goods thrown overboard, then, the law of contribution applies, to repair the loss sustained by the owner of the goods thus sacrificed for the common good. Neither is it a case of contribution, if the ship being lost in the same storm in which the jettison was made, a part of the cargo is saved; because the purpose for which the sacrifice of the goods thrown overboard was made, has not been attained. See 2 Valin, 205. Weytzen, p. 237. Gidon, 123.

In the case of a general shipwreck, the essential principle of contribution is wanting, there being no act voluntarily done for the common safety of the whole. Consequently, every man must take care of what belongs to him, and must depend upon his own exertions to save it. Ord. Louis XIV. art. 17. Valin, 207. 209.

It is unnecessary to notice particularly, those parts of the marine Ordinances of Bilbao, Wisney, Rotterdam, Copenhagen, the Code Napoleon, and the modern Prussian Code, promulgated in 1791 and 1794; which were quoted and relied on by the plaintiffs' counsel, because they apply either to an involuntary shipwreck, or to a jettison, or to damages sustained by a voluntary stranding, and not to a total loss of the ship; and are all susceptible of the same explanations which we have

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just giving of the Ordinance of Louis XIV., which they resemble. It is admitted, that neither the Rhodian law, nor any of these Ordinances, have noticed the case of a voluntary stranding, for the common safety, followed by the total loss of the ship.

We meet with but two decisions, which have ever been given upon the very point presented in the consideration of this Court. The first was made by the maritime judges of Amsterdam, in the year 1681, and is reported by Bynkershoek, 2 Byk. Quæst. Jur. Univ. l. 4. c. 24. p. 494. They decided, "that if a cable is cut in a storm in order to save the ship, whereby the anchor is lost, the cargo is not bound to contribute, because there was no voluntary jettison." These Judges then add, "for the same reason, if a vessel be voluntarily run ashore, the goods laden upon her while she is lying aground, are not to contribute any thing, also, because no contribution is due, unless the ship is saved;" and the Rhodian law, 4, is cited. Now, if this case be truly reported, which may well be doubted, it is, upon the face of it, too absurd to merit the least respect. The reason assigned, why, if the cable be cut in a storm in order to save the ship, contribution shall not be made to repair the loss of the anchor, is, that the jettison was not voluntary; and yet the case supposes, that the anchor was voluntarily sacrificed to save the ship: Neither can there be any doubt, but that the law is different from what this case states it to be, in relation to the loss of the anchor. Abbet. 219. In like manner, one of the reasons, assigned by the Judges in this case, why, if the vessel be stranded and lost, there shall be no contribution, is, that the stranding was not voluntary; and yet the case states, that the vessel is voluntarily run ashore. The other reason assigned is, that there is no contribution, unless the vessel be saved; and this reason is founded on the Rhodian law, 4, which relates to goods put into a lighter to save the ship, but without effect; in which case it is truly said, that there can be no contribution, except where

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without limitation; and whether it be to the whole amount of the vessel, or to a half, or a greater or smaller proportion of her value, forms no part of the principle upon which his opinion is formed.

Weytzen, 237. Loestnius, 1475. Kertke, 781. Minquardus, 393, and Pothier, 106, all speak upon this subject in reference to an ineffectual jettison, or of an involuntary shipwreck, and lay down the same doctrine as Vinnius.

Emerigon, 408. 614: 616, is the only writer upon the subject of average, who animates an opinion, that in the case of a voluntary stranding, followed by the total loss of the vessel, there shall be no contribution. "If," says he, "the stranding was done voluntarily for the common safety, it would be general average, provided always that the ship be again set afloat; for, if the stranding be followed by shipwreck, then it is, *ave qui can.*"

There is no writer upon maritime law, whose opinions are more to be respected, in general, than those of Emerigon. But, after all, it is only an opinion in this case; in support of which, he quotes no law, ordinance, or decision, and does not even condescend to assign a single reason. Immediately after the opinion just cited, he refers to what he afterwards says, in respect to a jettison which does not save the ship; as if he intended to illustrate, by this latter case, the opinion he had given in the case of a voluntary stranding and loss of the ship. Now, it is most obvious, that no two cases can be more unlike in principle. In the one, an ineffectual sacrifice of goods is made to save the ship. And in the other, an effectual sacrifice of the ship, is made to save the cargo. In the former, the property demanding contribution, has no merit, and is therefore entitled to no compensation. In the latter, the converse holds good throughout. Nevertheless, we should be greatly embarrassed by this naked opinion of Emerigon, if it stood uncontradicted by other writers, equally respectable. The opinions of these jurists, we shall now proceed to state.



Voss. §. 14. Tit. 2. a. 3, in his Commentaries on the Digest, says, "if the ship lies aground without the fault of the master, and he, having made jettison in order to save the ship, has thought it most prudent to save the goods by means of lighters, and if the greater part of the goods being saved, a storm shall arise and the ship be broken, this damage being incurred for the sake of averting the common danger, shall be suffered in common; for, the goods do not appear to have been put into the lighters, for the sake of lightening the ship in order to save her and the goods remaining on board; but rather the ship itself has been exposed to accident, that the goods should be saved by means of the lighters;—analogous to this, is the following case—If, by the common advice of the best informed men on board, the ship has been wilfully run ashore, and thus has perished, the goods being saved."

Here the writer assigns the reason of his opinion, and founds it upon the distinction between an ineffectual jettison where there is no merit, and an effectual sacrifice of the ship where there is; and denies contribution in the former, and allows it in the latter, upon the reason of that distinction. Bynk. 2. vol. p. 424, in his criticism upon the decision of the Dutch Judges, before alluded to, condemns that opinion throughout; and assigns unanswerable reasons, in our opinion, for his censure. "It is one thing," he says, "if the tempest alone drives the ship ashore, and there breaking the armament of the ship, the masts, &c., in which case the ship owner is like the smith, who, while he is performing his duty, breaks his anvil or hammer. It is another thing, if by the advice of a majority of the crew, that the lives and the goods may be saved, the vessel is run ashore; or by their advice, the mast is cut away, or the cables and anchors are cut; Therefore, theirs is the best opinion, who answer, that if the masts or cables are cut, that the vessel and goods may be saved from the storm, there shall be contribution; and surely the same, of a vessel voluntarily run ashore,

The exercise of the power by the state governments, to pass Bankrupt and Naturalization Laws, is incompatible with the grant of a power to Congress, to pass uniform laws upon the same subjects.

The omission of Congress to pass a Bankrupt Law, does not authorize the several states to pass such laws; but the omission of that body to pass such a law, is, in effect, a declaration that there ought not to be such a law.

The law of Pennsylvania of 13th of March 1812, is unconstitutional, because it impairs the obligation of a contract, and because Congress have exclusively the power to pass a Bankrupt Law.

- *WASHINGTON*, Justice, delivered the opinion of the Court.

This is an action brought upon a bill of exchange drawn by the defendant, on the 10th of May 1811, at St. Davis, for value received there, in favor of the plaintiff, on himself, at Philadelphia, 90 days after sight, which was regularly noted for non-acceptance, and protested for non-payment.

This action was brought on the 4th of May 1812; to which the defendant pleaded in bar, his discharge, under a law of this state, passed on the 13th of March 1812, for the relief of insolvent debtors; obtained provisionally on the 23d of April, and finally, on the 29th of May 1812. The case agreed, states, that the defendant did not give to the plaintiff, or to any agent of his, notice of the defendant's petition, which was presented on the 20th of April 1812, although the plaintiff's attorney was informed of the application a few days after it was made; nor has the plaintiff proved his debt under the said proceedings.

The act referred to in the plea declares, that a debtor who has conformed to the several regulations of the law, for the purpose of vesting all his property in the assignees, for the benefit of his creditors; and who has received his certificate of discharge from the commissioners; shall be set at large by the sheriff, if he be imprisoned; and that such certificate shall be conclusive evidence of the fact, that such petitioner has been discharged, by virtue of that act; and shall be construed to discharge such insolvent from all debts and demands due from him, or for which he was liable, at the date of such certificate.

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or contract, or originating before that time, though payable afterwards.

It is objected to this plea—1. That the Act under which the discharge is claimed, having been passed since the year 1789, affords no binding rule for the government of this Court:—2. That the law is unconstitutional and void in two respects; as being a bankrupt law—and as being a law impairing the obligation of contracts.

The ground of the 1st objection is, that the 34th sec. of the Judicial Act of Congress, passed on the 24th September, 1789; which declares, "that the laws of the several states, except where the constitution, treaties, or statutes, of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply," extends only to such laws of the several states, as were in force at the time this law was passed. Admitting this position to be correct, it would not follow, that this law would not, on that account, have a binding force, or furnish a rule of decision, in this case. The laws even of foreign countries where a contract is made, are by the comity of nations regarded every where as a rule of decision, in relation to that contract; and it would be strange if the laws of one state, in which a contract was made, should be disregarded in any other state of the Union as a rule of decision. In like manner, the laws of a country, which operate to discharge a contract made in the same country, are regarded and enforced by foreign Courts. This doctrine was fully examined in this Court, in the case of *Camfranke vs. Brunell*,\* upon a question of bail. Independent, therefore, of the Act of Congress, if a contract made in this state, or with a view to its laws, be discharged under a law of this state, against which no constitutional objection can be made; such laws would be regarded as rules of decision by this Court, as well that which discharged the obligation, as that under which it was created.

\* Vol. I. page 340.

It was denied by the counsel for the plaintiff, that the contract in this case had a view in its execution to the laws of Pennsylvania; but nothing can be more clear, than that the bill in question amounted to a promise, made by the defendant, to pay the sum mentioned in it, in the city of Philadelphia, ninety days after sight. Payment could have been demanded no where but in Philadelphia, in order to enable the plaintiff to recover. The bill in this case, is precisely like that in the case of *Robinson vs. Bland*, 2 Burr, 1007; and is consequently within the principles laid down in that case.

These principles would be sufficient for the decision of this part of the case, without resorting to the Act of Congress, which has been mentioned; but, as other cases may occur, where the general rule admitted by the comity of nations, may not entirely apply; and, as there appears to us to be no difficulty in giving a construction to the 34th section of this Act; it may not be improper to take this opportunity of doing it.

It is to be remarked, in the first place, that the words of this section are general, so as to include, as well the laws of the respective states, which might thereafter be passed, as those which were then in existence. The reason for construing this section prospectively, as well as in reference to the time when this law was enacted, is equally strong. The powers bestowed by the Constitution upon the government of the United States, were limited in their extent, and were not intended, nor can they be construed to interfere with other powers, before vested in the state governments; which were, of course, reserved to those governments impliedly, as well as by an express provision of the Constitution. The state governments, therefore, retained the right to make such laws as they might think proper, within the ordinary functions of legislation, if not inconsistent with the powers vested exclusively in the government of the United States, and not forbidden by some article of the Constitution of the United States, or of the state; and such laws were obligatory upon all the citizens of that state, as well as others who

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might claim rights or redress for injuries, under those laws, or in the Courts of that state. The establishment of federal Courts, and the jurisdiction granted to them in certain specified cases, could not, consistently with the spirit and provisions of the Constitution, impair any of the obligations thus imposed by the laws of the state; by setting up in those Courts a rule of decision, at variance with that which was binding upon the citizens, if the suit had been instituted in the state Court. Thus, the laws of a state affecting contracts, regulating the disposition and transmission of property, real or personal, and a variety of others, which, in themselves, are free from all constitutional objections; are equally valid and obligatory within the state, since the adoption of the Constitution of the United States, as they were before. They provide rules of civil conduct for every individual who is subject to their power, in all their relations to society; and consequently cannot, in cases where they apply, cease to be rules by which the conduct of those individuals is to be decided, when brought under judicial examination, whether the decision is to be made in a federal or state Court. The injustice, as well as the absurdity of the former deciding by one rule, and the latter by another, would be too monstrous to find a place in any system of government. Thus, for example, if the laws of a state, which regulated the distribution or transmission of property in the year 1789, should be totally varied by a subsequent law, the latter only would be the rule by which property could be distributed or transmitted from the time the law came into operation; and it can never be seriously contended, that a person interested in this property, and from the adventitious circumstance of his residence in another state, entitled to make his claim, either in the federal or state Court, should recover more by resorting to the former, than he would have recovered had he applied to the latter Court. With respect to rules of practice for transacting the business of the Courts, a different principle prevails. These rules are the laws of the Court, and are, in relation to the federal Courts, laws arising

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Under the constitution of the United States, and consequently not subject to state regulations. It is in reference to this principle, that the 17th section of the same Judicial Act authorizes the Courts of the United States to make all necessary rules for the orderly conducting business in the said Courts, provided the same are not repugnant to the laws of the United States; and under this power, the different Circuit Courts, at their first sessions, adopted the state practice as it then existed, which continues to this day, we believe, in all the states; except so far as the Courts have thought proper, from time to time, to alter and amend it. Indeed, the counsel for the plaintiff, in this case, seemed to admit the distinction between general laws affecting rights, and those which relate to the practice of the Courts; but still he contended, that the Act of Assembly in question, afforded no rule of decision for this Court, and could not be pleaded in bar of the action, because it was enacted since the year 1789. Now, it is most clear, that a law which discharges a contract, is no more a law of practice, than one, under the sanction of which, the contract was made. If it would bar the action in a state Court; it would equally do so in a federal Court; although the particular mode of setting up the bar, might depend upon the practice and rules imposed by the state laws upon the former Courts, and those which the latter may have thought proper to adopt.

The next question is, whether the law relied upon by the defendant, to bar the present action, is repugnant to the Constitution of the United States; and, on that account, is not to be regarded by the Court, in this case? We shall reverse the order pursued by the counsel, and consider, in the first place, whether this law is repugnant to the Constitution, upon the ground of its impairing the obligation of contracts?

It may be proper to premise, that a law may be unconstitutional, and of course void, in relation to particular cases; and yet valid to all intents and purposes, in its application to other cases within the scope of its provisions, but varying from the

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other in particular circumstances. Thus, a law prospective in its operation, under which a contract afterwards made, may be avoided in a way different from that provided by the parties, would be clearly constitutional; because the stipulations of the parties, which are inconsistent with such a law, never had a legal existence, and of course could not be impaired by the law. But if the law act retrospectively, as to other contracts, so as to impair their obligation, the law is invalid; or, in milder terms, it affords no rule of decision in these latter cases.

The question then is, whether a law of a state, which declares that a debtor, by delivering up his estate for the benefit of his creditors, shall be for ever discharged from the payment of his debts, due or contracted before the passage of the law;—whether the creditor do any act, or not, in aid of the law; can be set up to bar the right of such creditor to recover his debt, either in a federal or state Court? We feel no difficulty in saying that it cannot; because the law is, in its nature and operation, one which, in the case supposed, impairs the obligation of a contract. What is the obligation of a contract? It is to do, or not to do, a certain thing; and this may be either absolutely, or under some condition; immediately, or at some future time, or times; and at some specified place, or generally. A law, therefore, which authorizes the discharge of a contract, by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation, by substituting for the contract of the parties, one which they never entered into; and to the performance of which, they of course had never consented. The old contract is completely annulled, and a legislative contract imposed upon the parties in lieu of it. That a law which declares a subsisting contract to be void, impairs its obligation, will, we presume, be admitted by all men who can understand the force of the plainest terms; or, if not so, then we should be curious to know by what means the obligation of a contract can be impaired? And if

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this be the effect of such a law; in what respect does it differ from another, which declares, that a debt consisting of a specified sum, and due at an appointed period of time, shall be discharged at a more distant, or indeed at a different time, or with a smaller sum? The degree of injury to the creditor, may not be so great in the one case as in the other; but the principle is precisely the same. That the framers of the Constitution were extremely jealous of the exercise of such a power by the state governments, is apparent from other parts of the section, in which the provision we are examining is found. It would have been a vain thing, to prohibit the state legislatures from passing laws, by which a contract might be annulled, or discharged, by payment of a less sum than is stipulated, if they could emit bills of credit, and make them, or any thing but gold and silver coin, a tender in payment of debts; and, therefore, they are expressly forbid to pass any such laws. And yet, a law, which should make a depreciated paper currency a tender in payment of debts, might be less injurious to the creditor, than one which discharges the debt altogether, upon the payment of perhaps a shilling in the pound, or any other sum less than that stipulated to be paid.

The opinion given upon this last point decides the cause in favour of the plaintiff; and we might well spare ourselves the trouble of examining the other objection made by the plaintiff's counsel to the validity of this law. But, when we observe, from the case under consideration, that a power to pass bankrupt laws is deemed by one state, at least, to be rightfully vested in the state legislatures; (for otherwise we must suppose it would not have been exercised;) and when we recollect, that the Constitution of the United States contains a grant of other powers to the general government, which may equally with that immediately under consideration be exercised by the state legislatures, if such a right exist in either case; we hold it to be our duty to embrace the first opportunity which presents itself, to express the unhesitating opinion which we entertain upon these



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great questions, and thus to pave the way for as early a decision of them, as possible, by the Supreme National Court.

No citizen feels a higher respect than we do for the state governments, or would be more cautious in questioning the validity of any laws which their legislatures might think proper to enact. But we should very unfaithfully discharge our duty, were we to remain silent witnesses of designed or unintentional usurpations, by these governments, of powers properly belonging to the general government; when a case comes judicially before us, which demands an expression of our opinion on these subjects. The sooner the limits which separate the two governments are marked by those authorities, which can alone define and establish them, the less danger there will be of serious, if not fatal collisions hereafter, arising respecting essential powers, to which a prescriptive right may be asserted by the one, in opposition to the chartered rights of the other. It is from these considerations that we venture respectfully, yet firmly, to examine the question, whether the power given to Congress to pass uniform laws of bankruptcy, be exclusive of such power in the state governments; and whether the latter may exercise it whenever the former has not thought proper to do so.

It would seem, at the first view of this question, that, if an unqualified power be granted to a government to do a particular act, the whole of that power is disposed of, and not a part of it; consequently, that no power over the same subject remains with those who made the grant, either to exercise it themselves, or to part with it to any other government. But, if the application of this principle to the complicated systems of government which prevail in the United States, should be liable to doubt, it will, we presume, be admitted with this qualification; that whenever such a power is given to the general government, the exercise of which by the state governments would be inconsistent with the express grant, the whole of the power is granted, and, consequently, vests exclusively in the general government. In such a case, the people resume the power, which before resid-

ed in the state governments as to this subject, without which they could not grant the whole to the general government; and, if resumed, it would seem to follow, that the state governments can in no event exercise the same power, without showing either an express grant of it, or that it is fairly to be deduced from the circumstance upon which the claim is founded.

That the exercise of the power to pass bankrupt and naturalization laws by the state governments, is incompatible with the grant of a power to Congress to pass *uniform* laws on the same subjects, is obvious, from the consideration that the former would be dissimilar and frequently contradictory; whereas the systems are directed to be *uniform*, which can only be rendered so by the exclusive power in one body to form them.

It was admitted, in the argument of this cause, that whenever Congress shall think proper to exercise the power granted to that body, to pass uniform laws of bankruptcy, the state governments cannot legislate upon the same subject. But it was contended, that, if Congress shall decline to exercise the power, the right to pass such laws results to the state governments. This conclusion appears to us to beg the whole question in controversy. It resigns all claim to a *concurrent right* in the state governments, and sets up one which is to arise on a condition, not to be found in the Constitution, but which is gratuitously interpolated into it.

If, then, this claim of the state legislatures is not founded upon any express grant made to them in the Constitution, is it to be deduced from the circumstance of a *nonuser* of the power by Congress? This doctrine appears to us to be as extravagant as it is novel. It has no analogy, that we know of, in legal or political science. It must, in some way or other, be likened to the case of forfeiture, which could not, we conceive, answer the purpose; because, if the power of Congress is, upon principles purely legal, divested by an omission to exercise a valid right, it would not of necessity result to the *state governments*, but would more naturally revert to the people. If the

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forfeiture be political, then this absurdity would follow, that Congress would possess a right to do, by *omission*, what it must be admitted they could not effect by any direct and positive act:—that is, to delegate to the state governments the power of legislation over a particular subject, of which the people had thought proper not only to deprive the state governments, but to vest exclusively in the national legislature. The inconvenience of dissimilar and discordant rules upon the subjects of bankruptcy and of naturalization, no doubt, suggested to the framers of the Constitution, the remedy which that body adopted, of vesting the right to legislate in those cases in the general government; that some uniform system might prevail throughout the United States, if Congress should think that any regulations upon those subjects ought at all to be made. Now, it would not only violate the express grant of these powers to Congress, but the policy which led the Convention to withdraw them from the state governments, if they should be construed to result by implication to the latter, on account of the omission of the former to exercise them.

But let us examine into the reasonableness of this pretension of the state legislatures, and see if the policy which induced the grant of these powers to Congress be not effectually answered by the omission of Congress to legislate on those subjects as much as if they had done so. Suppose the subject of a bankrupt law to be brought before Congress, and the questions to be whether such a system be a wise one under any circumstances, or be at all suitable to the present state of the country; and that body should, in its wisdom, decide negatively on those questions, it would seem to follow, that no bankrupt law ought to exist in the United States, for the reasons which induced the rejection of any plan to establish such a system. In this case, what is Congress to do, in order to give effect to this policy? The answer is plain,—reject the bill and do nothing. Then the law of the land would be, that no man is compelled, against his will, to deliver up his property to be distributed amongst

his creditors ; and, consequently, that he is at all times liable to the payment of his debts, unless discharged by some other legal means. Now, will it be said that the state legislatures, availing themselves of the refusal of Congress to act upon this subject, can be at liberty to thwart the very policy which induced it ; and pass laws upon the same subject, not only changing the state of the law as Congress had constitutionally left it, but impugning the policy which led the Convention to deprive the state legislatures of the power altogether, by imposing upon the country at large *a variety of systems*, instead of *one uniform system* ? To argue, that to prevent such an absurd consequence, Congress must legislate upon the subject, is to assert, that in the exercise of a power intended to promote the general good, Congress must do some act, which, in its wisdom, it believes will produce a public evil—do wrong that good may come of it—a doctrine, as pernicious in politics as it is wicked in morals. How would state laws upon this subject, and in the case supposed, differ, otherwise than in degree, from similar laws, passed inconsistent with such as Congress might think proper to enact upon the same subject ? In the one case, the policy and the law of Congress might be opposed *in part only* by the state law. But in the other, the *whole policy and law* is defeated by inconsistent rules, upon a subject where Congress supposed that it was unwise to establish even a uniform rule.\*

The subject of naturalization, is strongly illustrative of the principles which this course of reasoning is intended to prove. The power to pass laws upon this subject, is found in the same section, and is expressed in words of the same import, with that respecting bankruptcies. Now, suppose Congress, deliberating whether the naturalization of foreigners ought, upon any, or upon what terms, to be allowed ;—that the deliberations of that body should result in the conviction, that the natural

\* The Bankrupt Law, passed by Congress, and afterwards repealed, is a strong exemplification of these principles.

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population of the country is most conducive to the public interest; and therefore, that no encouragement ought to be given to the migration of foreigners to the United States.—In what manner is this policy to be rendered effectual? Congress cannot, for the purpose of preventing the state legislatures from interfering in this business, pass a negative law, declaring that foreigners shall not be naturalized; because, if the Constitution forbids the exercise of such a power, by the state legislatures, such a law would be worse than unnecessary; and if it does not forbid it, then it would be void. Nothing, then, would remain for that body, but, as in the former case, to do nothing.

This, then, according to the argument on the part of the defendant, would be the signal to the state legislatures to commence their operations. Virginia, for example, is of opinion, that for the purpose of settling her extensive waste and uncultivated lands, the migration of foreigners to that state, ought to be encouraged by every means; and in order to favour this policy, she declares, that the residence of a year or a month, without any other restriction whatever, shall be sufficient to entitle all foreigners to the right of naturalization in that state. They are accordingly made citizens; and after the constitutional period, are chosen to represent the people of that state in the national legislature, and emigrating to the other states, with the Constitution in their hands, they claim all the privileges of natural born citizens of those states.

The other states might well complain, that, although the people had declared their willingness to admit foreigners to the privileges of natural born citizens, provided the regulations under which this admission is granted, were formed by the united wisdom of the representatives of *all the states*; yet they had never granted, or intended to grant, to one state, the right of legislation over the other states. They might contend, that the introduction of foreigners to the electoral franchise, and still more into the national legislature; was an experiment dan-

gerous to the tranquillity and the welfare of the nation;—that they might be tainted with principles unfriendly to our republican institutions, and with foreign attachments wholly incompatible with their duties as citizens and legislators,—that if admitted at all, they should not only abjure all allegiance to any foreign government, and, if of the order of nobility, should renounce all claim to the same; but that they ought to be men of good moral character, and attached to the Constitution of the United States; and finally, that the grant of this privilege should be preceded by a probationary residence in the United States, for a length of time sufficient to afford the necessary proof of the reality of these qualifications in the applicant.

To these complaints, what could reason oppose? Nothing;—she must be silent. And is this, then, a case where powers not expressly given by the Constitution, are to be assumed by construction and implication? It certainly will not be contended, that the powers to pass bankrupt and naturalization laws, are, by the amendments to the Constitution, reserved to the states in cases where they are not exercised by Congress; because, this reservation is made only of such powers as are not granted to the general government; if granted, it would seem to follow, that they are not reserved to the states, or to the people.

But it is not, in our opinion, correct to say, that Congress, by refusing to pass laws on these subjects, has not exercised the powers confided to that body by the Constitution, in relation thereto. The refusal amounts to a declaration of the public will, that such laws are unwise, and ought not to exist. And yet, upon the argument in favour of state pretensions, this monstrous doctrine must be maintained, that one or more states may pass laws, not only in opposition to the policy and the legislative will of the general government, but to the laws of the other states, enacted upon the same subjects, which, to a certain extent, they partially repeal. A doctrine leading to such

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absurd and dangerous consequences, ought to have something more solid to stand upon, than a constructive grant of power.

We are, upon the whole, of opinion, that the law under which the certificate is pleaded, in bar of the action, is altogether unconstitutional, for the reason last mentioned; and is so in reference to this debt, for the first reason.

We desire that it may be distinctly understood, that we do not mean to give any opinion on the subject of Insolvent Laws, Acts of Limitation, and the like, because they are not now before us; and sufficient to the day is the evil thereof. We have introduced the subject of Laws of Naturalization, because we find that subject to be, in all respects, precisely like that which is particularly involved in this cause.

*Judgment for plaintiff.*

## CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1818.\*

REPORT { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
Hon. RICHARD PETERS, District Judge.

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JOHN BELL ET AL. *vs.* NATHAN DAVIDSON.

The laws of the several states, as to the practice and proceedings in their Courts, are not obligatory on the Courts of the United States; and therefore, the Act of the Assembly of Pennsylvania, of 2d January 1815, as to copies certified by a notary public, is not applicable in this Court; all proper interrogatories must be answered on both sides, or the deposition cannot be read.

If the interrogatories are hypothetical, and in a certain event only are required to be answered, which event does not happen; or if they refer to records, which must speak for themselves; they need not be answered.

If the defendant relies upon one side of the plaintiffs' account, to establish his claim, he admits, *prima facie*, the debit side of the account; provided it be composed of items, which, by the form of the action, may be recovered. If the form of action is not such, he may use the credits to defeat or diminish the credits claimed by the defendant, when one can legally be opposed to the other.

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\* The cases decided in the Circuit Court, for the Pennsylvania District, in April Term 1815, and until the decision of the case with which this Term commences, will be found in 1 Peters's Reports.



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If a bill of exchange be drawn by A, with directions to charge the amount thereof to B, and it is accepted generally, and paid, the drawer is not liable to the drawee; unless it appear that B was the agent of A, and the direction to charge the bill to him, was only to point out the fund from which the bill was to be paid.

**ACTION** on fourteen bills of exchange, amounting to 9918*l*. 16*s*. 10*d*. sterling, drawn on the plaintiffs by the defendant, in favour of different persons, and paid by the plaintiffs for account of the defendant, in 1809.

The plaintiffs, established merchants in London, and as the agents and correspondents of the defendant, had large transactions with him, before the circumstances which gave rise to the present suit took place. In 1808, the defendant sent a vessel to Gibraltar, and other ports in Europe, under the care of Lewis R. Brown, with directions to remit the proceeds of the cargo to the plaintiffs. Two of the bills of exchange, each for one thousand pounds sterling, were drawn about the period this vessel sailed; and the plaintiffs were directed "to place them to the account of Lewis R. Brown." These bills were accepted generally, and when paid, were charged to the defendant, and to Lewis R. Brown. Lewis R. Brown remitted the proceeds of his cargo to the plaintiffs, and went to London; where he became intimate with the plaintiffs, had transactions with them, on his own account, and the plaintiffs opened an account in the name of Lewis R. Brown, and Nathan Davidson, in which charges were made, for moneys paid for the separate use of Brown and of Davidson; and moneys were credited, which were received from remittances made by Brown, for account of Davidson, as well as moneys paid by Brown from his own resources. Although an account, opened with Brown, stated a balance to be due to him from the plaintiffs, yet, it appeared, that this balance arose, from giving him credit for a note drawn by him in favour of the plaintiffs; which note was never negotiated by them, remained unpaid, and Brown was, therefore,

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and is still, a debtor to a large amount to the plaintiffs, on the close of accounts between him and them.

The defendant claimed a credit, for all sums which were received by the plaintiffs from Lewis R. Brown, and remittances made by him; these sums appearing to have been received, by accounts produced under notice to the plaintiffs, and which were returned with a commission issued to London. The right of the plaintiffs to charge him with the sums shown to have been paid by the same accounts, was denied; as it was stated, the defendant had not come prepared to examine these charges, the action being instituted on the bills of exchange only, and not on an account for money laid out and expended. Taking credit for those sums so shown to have been received, and deducting the two bills, for one thousand pounds each, which, having been drawn, as stated in them, "for account of Lewis R. Brown," were therefore alleged to have been paid for the account of Lewis R. Brown only; and excluding the sums charged in the same accounts, as paid by the plaintiffs; a balance would be due to the defendant.

The accounts were intricate and involved; and sums which were charged in some instances to Brown and Davidson, were afterwards charged to the separate accounts of both or one of them. It appeared, however, that advances had been made by the plaintiffs for insurances, and that the defendant and Lewis R. Brown were debtors to a considerable amount, before remittances were received from Lewis R. Brown or the defendant; and that the two bills, each of one thousand pounds, had been accepted by the plaintiffs before they received the remittances.

The defendant contended, that the two bills, each for £ 1000, having been drawn for account of Lewis R. Brown, and paid by the plaintiffs, were not to be charged to him; and cited *Kidd on Bills*, 97, and 5 *Com. Dig. Title Merchant*, s. 5. A bill drawn on account of a third person, and accepted for his account, if such third person fail in providing funds, the drawee who pays it has no claim on the drawer.

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Bell et al. vs. Davidson.

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If the drawee does not choose to accept a bill so drawn, he may protest it; and if he afterwards pay it for the honour of the drawer, he may thus make the drawer liable.

It was also claimed for the defendant, that the plaintiffs had no right to connect the defendant and Lewis R. Brown together in an account; and that the charges made in the accounts thus stated, were not evidence against the defendant, but the defendant might make use of the items credited in the accounts as evidence in his favour.

On the part of the plaintiffs, it was admitted, that if the two bills, each for £ 1000, had been accepted and paid for account of Lewis R. Brown, they could not be afterwards charged to the defendant; but that these bills were in fact drawn for the account of the *plaintiffs*, and that the direction to pay them for the account of Lewis R. Brown, was only given to designate the funds from which they were to be paid, which were the remittances to be made by Lewis R. Brown out of the defendant's property under his charge. The plaintiffs' counsel, to show that the direction to place a bill to the account of any one was of no consequence, and that the real state of the transactions would not be altered by such direction, cited Chitty on Bills, 55. The defendant, it was said, could not make use of the accounts produced by the plaintiffs, without admitting these accounts as *prima facie* evidence of the charges made against him in these accounts, he being at liberty to disprove these charges by evidence; and having offered no such evidence to the jury, these charges were to be considered as proved.

It was also contended, that the plaintiffs had a right, when they received remittances and payments from Lewis R. Brown, to appropriate the amounts to the payment of advances made by them, on the principle of law which authorizes the payment of either of two accounts or debts due by the payer to the receiver, as the receiver may think proper to apply the same, unless particular directions to the contrary are given at the time of payment. The defendant had received the amount of the bills;

and if they were drawn for the separate account of Lewis R. Brown, he might show the fact by his correspondence.

In the course of the trial, a copy of an account current, certified by a notary public "to be a true copy of an original account produced before him," was offered in evidence by the defendant, the plaintiff having failed to produce the original after notice, and his counsel declaring he had not the same. The Act of the Assembly of Pennsylvania, making the certificates of notaries evidence, was cited, in support of the claim to the admission of the paper.

The Court rejected the evidence, and adopted both the objections made by the plaintiffs' counsel.—First, that the Court are not bound by any Acts of the Assembly of the state, regulating the mode of proof, but only by general laws.

Second, that a copy of an original may be produced; but it must be sworn to be a copy, and not so certified.

An objection was made to reading the examinations of witnesses taken under a commission to London; on the ground that all the interrogatories which accompanied the commission had not been put to the witnesses. The Court stated, that it had been decided that each question must be put to every witness. The questions which accompany the commission are important to both parties, and other questions are frequently put, on the supposition that all will be answered.

It appearing to the Court that an answer by the witness to one of the interrogatories, which had not been put by the commissioners, would not have been legal evidence, the Court allowed the examination of the witness who had answered the remaining interrogatories to be read.

*WASHINGTON, Justice*, charged the Jury. This is a question of account, and the Jury will not expect assistance from the Court; they will examine the accounts, and form an opinion from them.

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Bell et al. vs. Davidson.

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There are two or three questions on which the opinion of the Court is required.

First, as to credits claimed by the defendant, taken from the accounts of the plaintiffs, and the debits in those accounts.

The principle of law is, that if the defendant is not prepared to prove credits, but relies for their proof on the plaintiffs' account, the plaintiff can call on him to admit, *prima facie*, the debits; but it is competent to the defendant to show, by evidence, that the debits were not properly made. This applies in every case, in which a defendant makes use of credits in the plaintiff's account.

The plaintiffs in this case might have inserted money counts in their declaration; and if the defendant had availed himself of the account of the plaintiffs, the plaintiffs could say, you have admitted the debits, *prima facie*, and you must disprove them.

This action is brought on bills of exchange, and the plaintiffs cannot recover on the debits in their account; and must recover on the bills. But if the defendant avail himself of the credits, the plaintiffs may bring in the debits of the account, the defendant having used the account to show debits.

Another question is, admitting that the debits are made out, can the defendant avail himself of them against the bills of exchange?

It is a principle of law, that payments may be applied to any account, unless special directions are given for their application when they are made; and if, when the credits were given, there was an account between the parties other than the bills, they may be applied to that account. With respect to the £2000 and the £790, the jury must determine from the accounts. With respect to the two bills, for £1090 each, there is much difficulty as to facts, but none as to the principle of law; that if a bill is directed to be charged to a particular account, other than that of the drawer, and is paid, it is not to be charged to the drawer.

But the jury have not all the evidence which might have

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Bell et al. vs. Davidson.

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been given, to show the actual state of the transaction, such, particularly, as the letters of the defendant to the plaintiffs. No evidence has been given, to show that the defendant was the agent of Lewis R. Brown to draw bills for him, and Brown may have been a principal in the transaction.

The Court will say, that if the bills were drawn, and Brown's name used only as the agent of the defendant, the general principle of law will not apply.

*Verdict for 1615 dollars, 85 cents.*

J. R. Ingersoll, for the plaintiffs.

Rawle, and Tod, for the defendant.

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The United States *vs.* Lukins.

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THE UNITED STATES *vs.* NATHAN LUKINS.

Indictment for resisting the marshal of the United States, in the execution of a warrant issued by the Judge of the District Court of the United States.

The 22d section of the Act of Congress, passed on the 30th day of April 1790, for the punishment of certain crimes, includes every species of process, legal and judicial, whether issued by the Court in session, or by a Judge or magistrate, acting in that capacity out of Court, in the execution of the laws of the United States.

On a count in the indictment, for resisting the officer of the United States, it is not necessary that the person resisting should use or threaten violence.

THE defendant was indicted for resisting and opposing the execution of process, issued against him by the Judge of the District Court of the United States, for the Pennsylvania District; and for an assault on the deputy of the marshal, when endeavouring to execute the process.

The indictment was founded on the 22d section of the Act of Congress, passed April 30th 1790, entitled, "An Act for the punishment of certain crimes against the United States."

The 22d section provides, that "if any person or persons shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States, in serving, or attempting to serve or execute any mesne process or warrant, or any rule or order of the Courts of the United States, or any other legal or judicial writ or process whatsoever; or shall assault, beat, or wound any officer or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant aforesaid; every person so knowingly and wilfully offending in the premises,

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The United States vs. Lukins.

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shall, on conviction thereof, be imprisoned, not exceeding twelve months, and fined, not exceeding three hundred dollars."

It appeared in evidence, that some time in November 1817, John Sisk, one of the deputies of the marshal of the District, having a warrant from the Judge of the District Court of the United States, for the Pennsylvania District, by which he was commanded to arrest the defendant, and bring him before the Judge, went into Montgomery county, where the defendant resided; and on his attempting to execute the warrant, the defendant resisted, in a violent and abusive manner, refused to accompany him, and with a hold-fast, an instrument of iron, used by cabinet-makers, (which was the business of the defendant,) raised against the officer, obliged him to desist, and to abandon the attempt to take him into custody.

Mr. Kittera, for the defendant, contended—that the provisions of the Act of Congress, apply only to resistance of the process of the *Courts* of the United States; and not to a resistance of a warrant issued by a single Judge of the Courts of the United States. The resistance of the process of a Judge, is punishable by the laws of the state of Pennsylvania; and the defendant should have been indicted and tried before a Court of the county where the offence was committed.

Ingersoll, District Attorney, considered the law of the United States as intending to provide against and punish all obstructions, resistance, and opposition to any process, issued under the authority of the United States, by a single Judge, as well as by a Court.

By the Act of Congress, passed 28th February 1793, the marshals of the United States have the same powers to execute process, as is possessed by sheriffs' officers, or their deputies; and the sections of the Judiciary Law, give to the District Judges of the Courts of the United States, authority to issue *process* for arresting, imprisoning, or bailing persons



## The United States vs. Lukins.

charged with offences against the United States. In Chitty's Criminal Law, vol. 4, Process in the index, refers to process against offenders, in the body of the work, and that process is described as a warrant to arrest a person charged with an offence. Unless the construction contended for by the United States is correct, the execution of a writ of *habeas corpus*, issued by a Judge of the United States, could be opposed and resisted, and the object of the writ could be defeated with impunity. Process, under the laws of the United States, relative to fugitives from justice, and fugitives from labour, always issued by a single Judge, would become useless, and without power; as to oppose the execution thereof, would not be an offence.

WASHINGTON, Justice, delivered the opinion of the Court. It is contended in this case, on the part of the defendant, that if the facts are proved against him, still the case cannot be cognizable before this Court, and that it is not a case described in the Act of Congress. The argument is, that the Act of Congress applies only to process issued by Courts of the United States, and not to that which may have been issued by a Judge; and, therefore, that resistance of the process issued by a Judge, is not an offence against the statute. If this is the right construction of the law, the counsel for this defendant is entitled to all the merit of having made the discovery; for such a construction never before was given, or contended for. If such a resistance is not an offence, for which a person can be prosecuted, it is better that all the criminal law be struck out from the Statute Book, as it is there only to show the debility of the general government. No man can be brought for trial before the Court, without process; and if he can resist it with impunity, he cannot be brought at all; and he may resist every law of the United States with safety.

The remedy proposed is, that the Courts of the state may

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The United States vs. Lukins

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punish for such resistance. It is not admitted, or denied, that state Courts have such powers; but, if no protection is given by the general government to their officers, it will require no prophet to show what will be the result of such an abandonment of all the rights of the United States. This is not the construction; and strong language would be necessary to show it to be. The first part of the section, applies to process of Courts, and to judicial writs issued by the Courts of the United States. Was it ever before denied, that a warrant is process?—and it is not denied, that the Judge who issued the warrant in this case, had a right to issue it.

The last part of the section is used to include all legal process in the hands of an officer of the United States; and the legislature did not mean to confine it in any degree. The expressions are consistent with the policy of the law, and the words are general, to comprehend all descriptions of process whatsoever.

The jury are the judges of the facts, and they will say if the facts are proved. The Court will say, as there is a point of law involved, that if the witnesses for the prosecution are believed; a clearer case cannot, in the opinion of the Court, be presented, of resistance and opposition to process, legally in the hands of the marshal.

The officer proceeded in the formal way, read the warrant, and required that the defendant should come with him to Philadelphia; the defendant refused to come, would not come, and the refusal is accompanied with resistance. The assault charged against the defendant, is a distinct offence; and the provisions of the first part of the law, do not require that an assault shall be committed, in order to complete the offence. It was the duty of the defendant to come with the officer; and if he says he will not come, and does not come, this is a resistance of the officer, within the prohibitions of the law, and no excuse will serve him.

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The United States vs. Lukins.

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The Court say nothing about the second count, which charges an assault on the officer; for if the witnesses for the prosecution are believed, it is of little importance, as the punishment of the offence is the same, whether it has been accompanied with an assault or not.

*Fordice, guilty.*

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The United States vs. Howard et al.

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THE UNITED STATES vs. HOWARD & BEEBEE.

Indictment for confederacy with pirates, knowing them to be guilty as such.

The crimes of piracy mentioned in the 8th section of the Act for the punishment of certain crimes, passed 30th of April 1790, are such as are committed by citizens of the United States, or on board of vessels of the United States; and therefore, the 10th and 11th sections, as to accessaries, refer to the acts of piracy mentioned in the 8th section.

A confederacy by citizens on land, or on board of an American vessel, with sea robbers, or pirates, by the laws of nations; or the yielding up of a vessel by a citizen to such pirates, is within the provisions of the 8th section of the Act of Congress.

An endeavour by a mariner to corrupt the master of the vessel, and to induce him to go over to such pirates, is within the provisions of the 8th section of the law.

To establish the crime of confederacy, there must be some proof of criminal intentions in the person charged.

The language of the 12th section of the law implies, compact and association with the pirates, as well in relation to the past, as to the future.

Any intercourse with them, which is calculated to promote their views, in within the provisions of the law.

**INDICTMENT** for consulting, combining, confederating, and corresponding, with certain pirates and robbers on the seas, the defendants knowing them to be guilty of piracy and robbery.

The material facts in the cause, as acknowledged by the defendants, (for there was no other testimony given to support the indictment,) was, that on the 10th of July 1817, the defendants, being branch pilots, belonging to the Delaware bay and river, spoke a small black schooner at sea, about twenty miles south of the Capes of Delaware, bound, as she said, from New-Orleans to New-York. The defendants asked the persons on board, if they would accept of some fresh fish, which

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The United States vs. Howard et al.

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they consented to do, and gave the defendants, in return, some gin. This was stated by other witnesses to be a common occurrence, when ships from sea are met with by pilot boats, and is considered as a mere interchange of civilities. Whilst the defendants were alongside of the schooner, the apparent commander of her offered them 3000 dollars, to land them and their effects somewhere on the Delaware, which the defendants refused, considering the conduct and appearance of those persons to be suspicious, and fearing, that by acceding to their proposal, they might incur the risk of a forfeiture of their boat, and expose themselves to a prosecution, which might deprive them of their liberty. The defendants then determined to seek a harbour within the bay of Delaware, on account of the weather, which was threatening; and taking that course, the black schooner set all her sails, and followed the track of the pilot boat. The defendants had been previously requested to send a pilot on board the schooner, which they declined doing; but they permitted her to follow them in, around the point of Cape May, where both vessels came to anchor. The defendants then went on board the schooner, and demanded the usual pilotage to which they were entitled, where the pilot serves as a guide to a vessel into the bay, which was refused; but the commander of the schooner offered the defendants sixty dollars for their skiff, to enable him to land his crew and cargo. This was refused by the defendants, who, having unfavourable suspicions of the persons on board of the schooner, determined to have nothing to do with them. Those persons then declared, that they would take the skiff by force, which they accomplished; and they conveyed themselves, five trunks, and a bag of specie, to a small fishing vessel lying at some distance from them, which they had previously ascertained would receive them and their baggage on board, and convey them up the Delaware. Before the departure of those men from the schooner, they talked of scuttling and sinking her, with such of the cargo as remained on board, and the five trunks were

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Barchy & Co. vs. Kennedy & Co.

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to establish such a usage; and we are, therefore, of opinion, that the only ground for admitting this contested charge, is the implied agreement between the parties; should the jury be satisfied that the accounts, adding the interest to the balance of principal and interest, were regularly transmitted to the defendants, and were acquiesced in by them.

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Pierce et al. vs. West's Executor.

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PIERCE & M'DONALD vs. WEST'S EXECUTOR.

In equity. Where leave is given to amend the bill, it should state only so much of the original bill, as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill.

The amendment should be by a separate bill, and not by interlining the original bill.

The amended bill should call on the original defendants to answer the new matter, or on the new parties, if any, to answer both.

Upon a rule obtained by the defendants, to show cause why the amended bill, filed in this case, should not be referred to the master for impertinence; it appeared, that after all the original defendants, except two, had answered the bill, the plaintiffs obtained leave to amend, by making new parties. The new bill contains all the matter of the original bill, together with that applicable to the new parties, and calls upon all the defendants to answer this bill.

*WASHINGTON, Justice.* The rule is, that the amended bill should state no more of the original bill, than may be necessary to introduce, and to make intelligible the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out, and separating the old from the new matter; at the peril of having their answer excepted to, if any mistake should happen, and all the matter of the amended bill should not be answered.

The amended bill calls upon the original defendants to an-

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Peirce et al. vs. West's Executor.

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swer *it*, and upon the new defendants to answer both that, and the original bill.

Wherever leave to amend the bill is granted, it is more proper to file an amended bill, than to interline the original bill; particularly, if some of the defendants had before answered that bill.

The rule, therefore, must be made absolute. But on motion of the plaintiffs' counsel, leave was granted to file a new amended bill, comprising only the new matter, instead of referring the bill.

Cases cited by the plaintiffs' counsel, *Hinde's Prac.* By the defendants' counsel, *Harris, C. P.*

Levy, and Tod, for plaintiffs.

Binney, and Chauncey, for respondent.

**CAMPBELL'S LESSEE vs. HARPER & CONWAY.**

The return of the marshal of the service of a declaration in ejectment, stating, that he had shown it to one defendant, and delivered a copy of it at the dwelling house of the other, in the presence of his wife, is not sufficient; as a copy should have been left at the dwelling of both defendants, and the notice should have been read or explained by the marshal, and the return should have stated, that the defendants were tenants in possession. If all the defendants in ejectment inhabit the same house, and this appears by the marshal's return, it is sufficient to deliver one copy. An affidavit of service is only necessary, where the service is not made by an officer of the Court.

Where a rule on the tenant in possession can be taken, and the effect of a judgment under such a rule.

**RULE** to show cause why the judgment should not be opened, and the *habere facias possessionem* issued thereon, set aside. The material reasons assigned were, that a copy of the declaration was not left with Harper, one of the defendants; and that it did not appear, by the marshal's return, that the defendants were tenants in possession. It was further objected, that the marshal's return was not sworn to; and also, that the notice annexed to the declaration, referring to the whole of the term, and not to the first day of it, the defendants have the whole term to appear in; and, therefore, that judgment by default was improperly entered at that term. Cases cited, Running. 153. 158: 165. 228. Sellon, 299. Bull, N. P. 97.

It was answered, that the affidavit, on which this rule was obtained, acknowledges that Conway was duly served with the declaration, and denies that Harper was; which is contrary to the return of the marshal. The affidavit, therefore, taken in connexion with the return, shows, that the declaration was

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Campbell's Lessee vs. Harper et al.

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served on both defendants, as well as that they were tenants in possession.

The service need not be sworn to, unless when the duty is performed by some person, other than a sworn officer of the Court.

The judgment by default was rendered on the 13th of May, 1815, on a twenty days' rule, obtained on the 17th of April. It was said to be the uniform practice, to obtain the rule to appear and plead at the commencement of the term, and to enter the judgment after the expiration of the time, subject, however, to be set aside upon the appearance of the defendant on any day of the session. That it is not the practice to serve the defendant with a notice of this rule.

*WASHINGTON, Justice*, delivered the opinion of the Court. Although this judgment may have been entered upon an insufficient return of the service of the declaration, yet, if the defendants acknowledge, in their affidavit, enough to supply omissions, and to cure defects in the return, the Court will not set aside the judgment. But this is not done in the present case. The return of service by the deputy marshal states, that, on a particular day, he served the ejectment on Harper and Conway, by *showing the original* to Harper, and by delivering a copy at the dwelling house of Harper and Conway, on the premises, said Conway being absent, and the copy left in the presence of his wife.

This return is clearly defective in not stating that a copy of the declaration was delivered to Harper, and that another copy was delivered to the wife of Conway, and that the notice was read, or explained severally to them. It is also defective in not stating, that Harper and Conway were tenants in possession. It is true, that where both defendants inhabit the same house, it is sufficient to deliver one copy of the declaration; but it does not appear, with certainty, that Harper and Conway resided together; nor are any of the above objections removed by the

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Campbell's Lessee vs. Harper et al.

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affidavit of the defendants; which merely states, that the ejectment was served on Conway only, and not on Harper, who was then in possession of one half of the premises. But it does not appear from this, that the two defendants resided together, or that Conway was in possession of any part of the premises.

The Court will never grant a judgment by default in ejectment, or permit it to be carried into execution, where it has been improvidently obtained; unless it appears, that the tenants in possession had full notice of the suit, and of what they are required by the notice to do.\*

There is no weight in any other of the reasons assigned for setting aside this judgment. An affidavit of the service of the declaration is not necessary, where the duty is performed by a sworn officer of this Court.

It is perfectly regular, to take a rule upon the tenants in possession to appear on some day during the Court to which the declaration is returned, and to sign judgment, if such appearance be not entered within the period prescribed; reserving, however, to the tenants in possession, the right to set aside the judgment, if an appearance be entered afterwards, and during the same time when the session of the Court continues beyond the period mentioned in the rule. This rule need not be served on the tenant in possession, as it is his own fault if he does not cause his appearance to be entered during the Court to which the notice refers.

*Rule must be made absolute.*

Shoemaker, for the rule.

Rawle, against it.

\* If the plaintiff's attorney would always subjoin to the notice the form of the return, where it is to be made by the marshal, or one of his officers; or of the affidavit, when the declaration is served by any other person; there would seldom, if ever, be occasion for objections of this kind.

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Cheongwo vs. Jones.

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## CHEONGWO vs. WILLIAM JONES.

The defendant cannot plead a foreign attachment, levied by him in his own hands, in bar to an action against him, by the defendant in the attachment, so as to set off damages against the plaintiff; he must plead the attachment in abatement. If judgment be obtained in the attachment levied in his hands, he may offset the amount.

In an action upon a promissory note, where the plea is *non assumpsit*, the defendant cannot give evidence of damages sustained by a breach of the contract upon which the note was given.

Upon a Canton contract to deliver teas, the quality of the sample chests to be selected by A; if A select and accept of chests of an inferior quality, in performance of the contract, there is an end to the warranty; and the Hong merchant could only be liable for a fraud, in imposing on the defendant teas apparently of a particular quality, but actually inferior. He could not be bound to deliver the selected teas, which might be very inferior, and bound also to deliver teas of a better quality.

If the teas selected by A, were afterwards changed, the buyer was at liberty to rescind the contract, and refuse to take the teas, as soon as the fraud was discovered—even at Amsterdam, the place of their sale; and to recover back what had been paid; and also to refuse payment of the note given on the contract, on the ground of a failure in the consideration of the note; or he might affirm the contract, and claim damages.

THE declaration contained three counts: 1, on a promissory note, subscribed by the defendant, dated 26th November 1805, at Canton, by which he promised to pay the plaintiff, by the name of Mr. Cheongwo, 9,102 dollars, for value received, in teas, twenty months after date; and if not paid at maturity, to pay at the rate of one per cent. per month interest, until paid: 2, goods sold and delivered: 3, an account stated.

The defendant pleaded *non assumpsit* and payment, with leave to give in evidence, the following special matters: 1st. Failure of consideration; the goods for which the note was given, not having been delivered in quality according to con-

tract : 2. A foreign attachment issued by the defendant against the plaintiff, in this Court, to October sessions, 1811.

The defendant offered evidence to prove that he had sustained damages, by a breach of the plaintiff's warranty, of the quality of the teas, which constituted the consideration of the note ; as well as for 8,000 dollars, paid to him when the note was given ; and also, that the teas sold to him by the plaintiff, had not been delivered to him ; but the plaintiff had delivered another parcel of an inferior quality. This evidence was rejected by the Court, as inadmissible upon the pleadings, as damages could not be proved to have been sustained by a breach of the plaintiff's warranty, in order that the same might be offset against the note. The Court stated, that in the case of *Graighe vs. Notnagle*,\* the only question decided by the Court was, that a creditor might lay a foreign attachment in his own hands, and might proceed to obtain a judgment. There is no doubt but that this judgment might be pleaded in bar, by way of offset, or might be given in evidence, on notice. But the attachment itself cannot be pleaded in bar. Where it is pleaded by a garnishee, in a suit depending against him, it must always be in abatement. As the defendant could not, upon the general issue, give evidence of damages sustained by the plaintiff's breach of contract, in diminution of the debt for which the suit is brought, so neither can he be allowed to give such evidence, under his plea of foreign attachment.

The parties then filed an agreement, in writing, that the defendant should be at liberty to give the evidence offered ; and that the jury might deduct the amount of damages to which they might think him entitled, from the debt, for which suit was brought.

It appeared in evidence, that some time in November, or December, 1805, the plaintiff entered into a verbal agreement with the defendant, then at Canton, that he would furnish him with 800 quarter chests of tea, one-half to be hyson skin, and the

\* *Peters's Rep.* 245.



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*Cheney v. Jones*

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other congo, at stipulated prices; the quality of which should correspond with the samples which should be selected by Edward Gray, the defendant's *supracargo*; who should be the judge thereof; and upon his selection of the samples, the contract was to be carried into effect. Master chests were accordingly sent to Mr. Gray, who, after examination, made his selection; and he declares, that he considered the quality of the samples to have been excellent. He afterwards examined and marked the chests, in the plaintiff's packing-house; and he states, that the qualities of the teas so examined, were excellent.

The plaintiff delivered on board of the *Eugenia*, the number of quarter chests of tea stipulated by the above agreement to be furnished, which were carried to Amsterdam, and placed, in the usual manner, in the warehouses of the Asiatic Company, for sale; and which were disposed of at the public sales of the company, which took place in 1807. Mr. Gray stated, that he saw the teas at Amsterdam, when they were inspected by the servants of the company, and that their quality was most inferior. The *hyson* teas, in particular, were black, and the quality so inferior, that he thought they would not have sold in the United States for the *prices*. He was clearly of opinion, that the teas delivered on board the *Eugenia*, were not the same with those which he had examined and marked in the packing-house of the plaintiff. The boxes he believed to have been the same; but from the difference in the quality and size of the *bricks*, which at Amsterdam were too small for the boxes, he was satisfied that the teas had been changed. It appeared from the public sales, made by the Dutch Company, in 1807, of different cargoes of teas, that the defendant's teas sold at prices very far below those of other teas of similar denominations, and of the best qualities.

In 1807, Mr. Gray returned to Canton, and stated to the plaintiff the bad quality of the defendant's teas. The plaintiff entered into a written agreement, reciting this representation:

by Mr. Gray, of the bad quality of the teas; and promising to settle with the defendant, upon the same terms that other respectable houses at Canton had done; and, in case of a difference of opinion between the parties, to submit the same to arbitration. Mr. Gray, who was personally a sufferer by the bad quality of teas he had purchased from the plaintiff, effected a settlement at the same time with the plaintiff, upon the principle, as was contended by the defendant's counsel, of being allowed the difference between the sales of his teas, and those of other teas, of the same denomination and quality of the teas stipulated to be delivered. This was denied by the plaintiff's counsel; and no settlement was effected by Mr. Gray, relative to the defendant's teas.

It was proved, on the part of the plaintiff, that the quality of the tea crop, of 1806, was generally indifferent; and that the contract between these parties, was made at a very late period of the season, when the market was much exhausted. A witness, examined on the part of the plaintiff, also stated, that he had lived at Canton for ten years, and that it was very difficult for a person who had not, for a length of time, resided in China, to judge of the qualities of teas. That instances had sometimes occurred, of a few chests of teas being changed on board the Hong boats, by the mariners; but that he had never heard of an instance of a cargo being changed by the merchant who had sold it. The witness who testified to these facts, had been extensively engaged in business at Canton.

*WASHINGTON, Justice*, charged the Jury. This is an action on a note of hand given at Canton, the signature of which is acknowledged by the defendant. But his counsel place his defence upon the two following grounds:

1st. That the consideration for which the note was given, was 800 quarter chests of tea, designated and marked, lying in the plaintiff's warehouse, which the plaintiff undertook to deliver on board of the *Eugenia*. That these chests were not

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delivered; but a different parcel of teas, not purchased by the defendant, were substituted, and put on board of the vessel.

2d. That if the identical teas, purchased by the defendant, were delivered, still they did not correspond in quality, with the samples selected by Mr. Gray; and, therefore, the defendant claims damages, for the breach of the warranty, to be offset against this note.

[The Judge here stated the evidence in relation to the contract at large.]

Upon this evidence, it may not be improper, at this time, to make two general observations: 1st. That a Canton contract, for the purchase and delivery of teas, is always understood to mean, a delivery on board of the vessel which is to transport them, at Wampoa, or, wherever the vessel is lying in the river. This not only results from the peculiar situation of the contracting parties, but is known to be the common understanding; and was so proved by a witness, who was examined, and who was well qualified to testify on the subject.

2d. The other observation is, that Gray was appointed by the parties the judge of the samples, with which the cargo was to correspond; but having made the selection, his judgment as to the correspondence of the cargo with the samples, was not to bind either of the contracting parties. This observation is made, in answer to an argument urged by one of the defendant's counsel,

If the argument in support of the first point, made by the defendant's counsel, be well founded, then it is immaterial whether the teas delivered on board of the *Eugenia*, corresponded with the samples or not. The complaint is not that the quality of these teas was inferior to that of the sample; but that the identical teas, purchased by the defendant, and for which this note was given in part payment, never were delivered. But what part of the contract, bound the plaintiff to deliver any particular parcel of teas? The agreement was to deliver teas, which should correspond in quality and deno-

mination with the selected samples; and if he did that, his warranty was fulfilled. If he did not, then he exposed himself to a claim for damages, for his failure. But he did not stipulate to deliver such teas as Mr. Gray might select; and there is no proof, that the teas selected and marked by Gray, in the packing-house, were the identical chops to which the selected samples belonged. All that is stated on this subject, is, that the teas so selected and marked, were of excellent quality.

There is no doubt but that Mr. Gray might, as the agent of the defendant, be empowered to bind the defendant by the act, accept of the particular chests, which he marked, as a performance of the plaintiff's contract. But, in that case, there would be an end to the warranty; and the plaintiff could only be liable for a fraud, in imposing upon the defendant teas apparently of a particular quality, but really of a different and inferior quality. It would be monstrous to say, that he was bound to deliver the teas which Mr. Gray might select, and which might be very inferior to the samples; and that he was also bound to deliver teas of a better quality, or to answer for the consequences.

If Gray's selection did not bind the plaintiff, the teas which he did select, were not the identical teas sold, and for which this note was given; and the plaintiff was therefore at liberty, notwithstanding the selection, to deliver other teas more correspondent, in his own opinion, with the quality of the samples. If the plaintiff was bound by Gray's selection, then he was unquestionably discharged from his warranty; because the teas were accepted in performance of the contract. The claim asserted, to the chests selected, and the claim for damages, for not delivering on board of the *Eugenia* teas of a particular quality, are totally inconsistent and inadmissible.

But, admit that the plaintiff was bound to deliver the teas which were selected and marked, is the evidence such as ought to satisfy the jury that these teas were afterwards withdrawn from the chests, and other teas substituted? This is a fact of

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which the jury must judge, upon the evidence given on each side. Mr. Gray does not state that he examined *all the chests*, either at Canton or Amsterdam; nor does it appear in what manner he examined them. Whether he could decide with accuracy as to the size of all the leads, without having had the boxes emptied of their contents, is a question for the consideration of the jury. As a further evidence of the incorrectness of the memory, as well as of the judgment of this witness, in relation to the alleged change of the teas, the plaintiff's counsel rely upon the testimony of Mr. Bleigh, who deposes, that in the course of the ten years he resided at Canton, he never heard of an instance of such a fraud being committed, either by one of the Hong, or by any out-door merchant.

Should the jury, however, be satisfied, that the teas were selected by the defendant's agent, and were afterwards changed, the next inquiry is, what were the defendant's rights, in consequence of these acts; and how did he exercise them?

There can be no question, but that it was competent to him to rescind the contract, and to refuse to take the teas, even at Amsterdam, as soon as the breach of contract was perceived. In that case, he might recover back the money paid to the plaintiff, and exonerate himself from the payment of this note; upon the ground taken by his counsel, that there was a failure of the consideration for which it was given. Or, if he did not choose to take this course, he might affirm the contract, and claim damages for a breach of it.

Did he do any act to rescind the contract? If he meant to do so, the teas ought to have been sold at Amsterdam, as the property of the plaintiff; whereas, they were sold as the property of, and for the account of, the defendant. But this is not all. In 1807, when his agent, Mr. Gray, returned to Canton, he made no complaint to the plaintiff, that the teas were changed, nor did he ask for a return of the money which had been paid by the defendant to the plaintiff, and also, that this note might be given up; but his objections were confined to the *bad quality*.

ry of the teas, for which reason he demanded compensation; and the plaintiff agreed to settle with him upon the same terms that other merchants had settled similar claims. These facts are stated at large in the written agreement, signed by the plaintiff and accepted by Gray, and must, therefore, be considered as conclusive on the defendant. Thus, it appears, that the defendant never thought of rescinding the contract, nor ever charged the plaintiff with the fraud now alleged; but, on the contrary, acted throughout in a manner to affirm the contract, and to confine his claim to a compensation in damages for a breach of it. It would be too much for the Court to permit him now to change his ground, and to treat the contract as one made without consideration, or of which the consideration had failed.

2d. The next question is, whether the contract between the parties has been fulfilled?

The contract was to deliver teas, which should correspond in quality with the samples selected by Mr. Gray. This gentleman has deposed, that the quality of the samples which he did select was excellent. This is his expression; and the jury must decide on its correct meaning, when used by merchants in describing the quality of an article, which they are about to buy or sell. In common parlance, it certainly imports a quality of a high grade, if not the highest.

The next inquiry is, what was the quality of the teas delivered? Mr. Gray has sworn, that at Amsterdam he examined them, and that the quality was most infamous. It also appears, from the sale made of these teas by the Dutch Asiatic Company, that they sold for prices very inferior to other teas of the same denomination, and of a high grade of quality. But, after all, the quality of the samples selected by Mr. Gray, and, consequently, of the 800 quarter chests, which the plaintiff warranted should correspond with the samples, must be decided by the confidence which the jury may place, not only upon the veracity of that gentleman, (which has not been question-

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but upon the accuracy of his memory and judgment; both of which have been.

It is contended, by the plaintiff's counsel, that the teas at the Canton market, of the crop of 1803, were generally of bad quality, and that the defendant's teas were purchased when the market was nearly exhausted, which would render them still worse; consequently, that Mr. Gray must be mistaken, when he states, that the samples, and the teas which he examined in the plaintiff's warehouse, were of an excellent quality. How far these facts impeach the credit of Mr. Gray, the jury must decide. But, if they believe that the quality of the samples has been correctly stated by this witness, then the circumstances just mentioned, afford no excuse to the plaintiff for delivering teas inferior in quality to the samples. If the market would not enable him to deliver teas of that quality, he ought not to have sent these samples; and if Gray refused to select inferior samples, the contract was at an end; because it was not to be concluded until the samples were selected. But when samples of a superior quality were sent and accepted, the plaintiff agreed to deliver 800 quarter chests, to correspond with them; and he cannot excuse himself, by alleging that he was unable to comply with this contract.

If the contract has not been fulfilled, the last inquiry is, what is the compensation to which the defendant is entitled?

The rule laid down by this Court in former cases like the present, is, to take the differences between the prices given for the teas of the injured party, at the Dutch sales, and other teas, of the quality which, by the contract, he was entitled to have, and of the same denomination, and to make that difference the rate of the injury sustained, to be applied to the first cost of the article, at Canton; to which is to be added the premium of insurance, duties, and all other usual expenses and charges.— Thus, if the defendant's teas sold for 50 or 25 per cent. less than other teas, which would be designated as excellent, or therabouts; the defendant is entitled to claim of the plaintiff.

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the same rate of this sum, which he gave for the same at Oulton, with the charges as before mentioned. The reasons for this rule are explained at large, in *Gilpin vs. Conesqua*,\* *Yauqua vs. Nixon*,† and *Conesqua vs. Willings & Francis*.‡ But if the parties have agreed to settle by any other rule, they are bound by it, and it is for the jury to decide, upon the testimony of Mr. Gray, taken in connection with the agreements of the 27th November 1807, whether any other, and what rule, was established between these parties.

As to the interest, I have only to repeat what was laid down by the Court, in all the cases before mentioned, that the law does not sanction the allowance of interest upon unliquidated damages.

*Verdict for plaintiff.*

Rawle, and Gibson, for plaintiff.

Binney, C. J. Ingersoll, and Dallas, for defendant.

\* 1 Peters's Reports, 85.

† 1 Peters's Reports, 321.

‡ 1 Peters's Reports, 172. 225. 301.



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 Lessee of Willis vs. Bucher et al.
 

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LESSEE OF HANNAH WILLIS vs. BUCHER ET AL.

A devise to A, and if he die without heir or issue, the estate to go to B, his brother; gives an estate tail to A, by implication.

Certain expressions in a will, showing an intention to dispose of his whole estate, may often enlarge an estate, which would otherwise be for life only, into a fee; as a devise to A, "freely to be possessed and enjoyed;" for here the implied intention is not inconsistent with the declared intention. But if real estate be given to A, expressly for life; or in tail, either expressly, or by a clear implication; there are no instances where such estates have been converted into a *fee simple*, by words of doubtful import, used in either.

The law never unnecessarily creates an executory devise; unless where the testator's intention would otherwise be defeated.

The entry in the books of the land office, that the balance of the purchase money was paid by the person "to whom the patent had issued;" is evidence that a patent did issue; although the patent is not produced.

A deed to A, in consideration of a sum of money paid, or secured to be paid, in the usual form of a deed of bargain and sale, is to be considered as a conveyance executed; notwithstanding a covenant by the grantor, "to make a patent," which can only mean, to obtain one, and deliver it to the grantee.

The provisions of the Insolvent Laws of Pennsylvania, passed in 1799, do not extend to estates tail, so as to make a conveyance, executed according to that law, operate as a bar to an estate tail.

**T**HIS was an ejectment for an undivided moiety of a tract of land, in York county, Pennsylvania. The title of the plaintiff was derived under a license dated in 1734, to David Priest, under which the land was surveyed, in 1737; and in the year 1746, William Priest, son of David Priest, had credit in the books of the land office, for the whole of the purchase money paid, with the following memorandum annexed, "to whom the land is patented in full."

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Lessee of Willis vs. Bucher et al.

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On the 4th of August 1747, William and Susannah Priest, conveyed this land, 200 acres, to Henry Willis; who, on the 13th of August 1764, duly made his last will, and disposed of the land between his two sons, William and Henry, in the following words, to wit:—"As touching such worldly estate, wherewith it has pleased God to bless me, I give, demise, and dispose of the same, in the following manner and form," &c. After providing for his wife, the will proceeds;—"also, I give to my son William Willis, whom I constitute my sole executor, seventy acres of land, (by certain bounds,) to be taken off the plantation I now live on," &c.; "also ten acres of meadow ground," (particularly described:) "if the said William Willis should chance to die without *hair* or *ishue*, the above said land must fall into the possession of his brother, Richard Willis." He then gives to his son William, a moiety of his horses and cattle, and adds a bequest to his daughter Mary, of £40, to be paid by his son William; and of the like sum to his daughter, to be paid by his son Richard; the will then proceeds to dispose of the whole of the remainder of his plantation, to his son Richard;—"and if the said Richard should chance to die without *hair* or *ishue*, the above said lands and effects shall fall into the possession of my son William, by them freely to be possessed and enjoyed."

In November 1783, William Willis took out a patent for the eighty acres so devised to him, which recites that a patent had been issued for this land, which was lost or mislaid; nor did it appear, whether it had passed the seal or not. In 1794, William Willis conveyed a part of the land to Mr. M'Kenny and his heirs, under whom some of the defendants claim title; and on the 2d of April 1796, he conveyed the residue of the tract to others, in fee, under whom the other defendants claim.

On the 20th of November 1800, William Willis died, leaving one child, Henry, who arrived at the age of twenty-one, on the 24th of April 1799. Henry became insolvent, and took the benefit of the Insolvent Law of Pennsylvania, on the 20th of Sep-

*Lessee of Willis vs. Bucher et al.*

tember 1799. He made a general assignment to his trustees of all his estate, real and personal; and on the 8th of April 1805, the surviving trustee conveyed all the right of Henry Willis, in and to the land which William Willis had conveyed on the 2d of April 1796, to Jacob Wayne. Henry Willis died in the year 1806, leaving issue the lessor of the plaintiff, and one other daughter.

Binney, and Tilghman, for the lessee of the plaintiff, contended, that William Willis took, under his father's will, only an estate in fee tail, by implication, with a remainder to his brother Richard, notwithstanding the introductory words in the will, the charge on William, of the £40 to his sister, or any other expressions in any other parts of the will. They cited *T. Raym.* 426. 452. *Willis's Rep.* 369. *Cro. Jac.* 695, *Ld. Raym.* 568. 3 *Wils.* 244. *Cowper*, 234. 410. 8 *Mass. Rep.* 3. 11. *Sand. Rep.* 388, to prove, that the words of a will are never construed to pass an estate, by way of executory devise, if the limitation can take effect as a contingent remainder. To show that tenant in tail, cannot, by agreement, bar the issue, *Plow. on Contracts*, 125. In answer to a point stated by the defendants in their opening, that Henry Willis permitted the defendants to make expensive improvements on the land, without discovering his title, which bound him and his issue, they cited 2 *Chan. Cases*, 108. To prove that a warrant, survey, and purchase money paid, constitute a legal right of entry, 2 *Bin.* 465.

Mopkins, and Ewing, for the defendants, contended—1. That William Willis took a fee simple, by force of the introductory words of the will; the charge on the devise of £40 to his sister, and the expressions "freely to enjoy and possess," which ought to be applied to the devise to William, with an executory devise to Richard, by force of the words "must fall into the possession of Richard;" which are equivalent to a limitation over, upon the happening of the contingency in the lifetime of Richard. They cited 7 *Durnford and East*, 589. 3 *Idem*,

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143. 256. 8 Idem, 1. 2 Mass. Rep. 56. 562. 2 Fearn on Contin. Rem. 245. 3 Burr, 1618. 6 Johns. 190. Cowp. 352. 1 Johns. 443. 3 Idem, 394. 2 Mass. Rep. 56.

2. That the lessor of the plaintiff has only an equitable estate for want of a patent; and that the estate in William Willis, under his father's will, was only an equitable estate, for want of a patent; and that the estate in William Willis, under his father's will, was only an equitable estate; and therefore, might be barred by a common deed of conveyance. See 7 Bac. Ab. 185. Amb. Rep. 510. Cases cited, 2 Chan. Cases, 63. 1 Vern. 440. 2 Idem, 344. 131. 225. 1 Fonb. 293.

This was contended to be an equitable estate, in Henry Willis, the testator, and his issue; not only for want of a patent, but because the deed from William and Susannah Priest to Henry Willis, of the 4th of August 1747, amounted to no more than articles of agreement, notwithstanding it contains words of grant. They referred to 3 Johns. Rep. 388. 1 Yeates's Rep. 393. 327. As to the nature of an estate where no patent has issued, 4 Bin. 145.

The defendants' counsel were about to offer evidence, in the opening, to prove, that Henry Willis was guilty of a fraud, in not disclosing his title to the purchasers of his father, at the time they did purchase, and in looking on, while the defendants were putting valuable improvements on the premises, without making any objection; which fraud, they contended, was sufficient to bar him and his issue. But the Court stopt the counsel, stating, that if their conclusion was even well founded, yet, such questions were not to be examined on the law side of the Court.

*WASHINGTON, Justice*, charged the jury. The first question is an unmingled one of law. What estate did William Willis take, under his father's will? The rule to which the counsel on both sides have appealed, and which is a landmark never to be lost sight of, is, that in the construction of wills,

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the intention of the testator is to be sought for and carried into execution, if it can be done without a violation of some established principle of policy or law. Thus, a devise to A and his heirs, gives a fee simple estate; but if the testator add, that upon the death of A, without issue, the estate shall go over to B, A takes an estate tail; because the limitation shows, that by the word heirs, the testator meant heirs of the body, and not heirs general. In this case, the devise is to William Willis generally; and if he die without heir or issue, the estate to go over to Henry. As to the testator's intention, so far as it is to be discovered from this clause of the will, there can be no doubt; as the limitation over to Henry was not to take effect, so long as William had issue, he clearly intended that such issue should take the estate in the mean time. But this they could not do as purchasers, because there is nothing given expressly to them; and therefore, in a deed, William Willis could only have taken an estate for life. But in a will where the intention of the testator is to govern, the Court will so construe the devise, as to vest an estate tail by implication, in William Willis, so that his issue may be enabled to take by descent.

This, as a general principle, is not understood to be denied by the defendants' counsel; but the argument is, that there are expressions in other parts of the will, which show that the testator intended to give a fee simple estate to William, with a remainder over to Henry; which may well be supported as an executory devise, inasmuch as the expressions used in the limitation to Henry show, that the contingency was to happen in his lifetime, else the estate could not fall into his possession.

The parts of the will, principally relied upon to show an intention to give a fee to William Willis, are the introductory clause, expressive of his intention to dispose of all his estate; the charge upon William, of the legacy of £40 to his sister; and the words "freely to be possessed and enjoyed," subjoined to the limitation to William, upon the death of Henry without issue.

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There is no doubt, but a declaration of the testator's intention to dispose of all his estate, or the charge of a gross sum upon the estate devised, or annexed to the devise as a condition, have frequently been held to convert an estate into a fee, which, for want of words of inheritance being added, the Court would have considered as nothing more than an estate for life. So a devise of an estate to A, "freely to be possessed and enjoyed," will be construed to pass a fee simple. It is remarkable, that in all these cases, the implied intention of the testator, collected from this and similar expressions, is perfectly consistent with his declared intention. But if the estate be given to A for life, expressly; or to A in tail, either expressly or by clear implication; there is no instance where such estates have been converted into a fee simple, by words of doubtful import, like those noticed before, in other parts of the will.

Such a construction in this case, would defeat the obvious intention of the testator in two particulars. 1. By giving the estate to William and his heirs general, where the intention was to confine it to the heirs of his body;—and 2. To annex a condition to the limitation over to Henry, and thus to leave the estate to descend to the heirs of the testator, in case William should die without issue, after the death of Henry; when it is plain, that the testator intended the estate for Henry, in exclusion of the daughter, whenever the estate of William should be spent, by a failure of issue. Another objection to the construction is, that it unnecessarily creates an executory devise, which will never be done, except in a case where the intention of the testator can no otherwise be carried into effect. If the limitation to Henry Willis, must depend upon the contingency of a failure of issue, during his life, as is strongly contended for by the defendants' counsel; there is still no necessity for construing the devise to William, to be an estate in fee simple; since William might, in that case, take an estate tail, with a contingent remainder to Henry, upon the event of William's dying without issue, during the life of Henry. But there is no

necessity even for this construction. It was obviously the intention of the testator, to give to William an estate in tail, with a remainder to Henry, in fee; which intention, as to the quality of the estate given to the remainder-man, may fairly be collected from the introductory words, relied upon by the defendants' counsel, for increasing the estate to William, as well as from the words, "by them freely to be possessed and enjoyed," in the devise to Henry, showing very clearly that the testator intended to divide this tract of land between his sons and their issue, respectively, with cross remainders in fee.

The argument of the defendants' counsel is, that William took an estate in fee simple, with a remainder over to Henry, by way of executory devise. If so, it may fairly be asked, what was the contingency, upon which the estate was to go over to Henry? If it be said, *upon* his dying without issue, then the answer is, that this is no contingency at all; because, the word *issue*, explaining what heirs were meant by the testator, William took an estate tail, in like manner as if the devise had been to him and the heirs of his body. If the word *heir* be relied upon, then the argument admits of the same answer; because William could not die without heirs general, during the life of his brother; and therefore, the word *heir* or heirs, would be construed to mean issue. There is therefore no contingency upon which an executory devise can be raised.

2. The next objection is, that no patent from the state of Pennsylvania, to William Priest or to Henry Willis, has been given in evidence, and that therefore the lessee of the plaintiff cannot maintain this ejectment.

There are two answers to this objection. The first is, that the entry on the books of the land office, that the balance of the purchase money had been paid by William Priest, to whom a patent had issued, ought to be considered as evidence that a patent did issue, although it is not produced; and secondly, that a warrant and survey, and purchase money paid, gives a legal right of entry in Pennsylvania. This was decided in the

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*Lease of Willis et. Bucher et al.*

1799, we are of opinion, that it will not bear the construction put upon it by the defendants' counsel, which would render the land in question liable to Henry Willis's debts. The assignment, therefore, by Henry Willis, under this law, did not bar his issue.

We are, upon the whole, of opinion, that the law is in favour of the lessor of the plaintiff, and that such should be your verdict.

*Verdict for defendants.*

The Court, on motion, granted a rule, to show cause, why the verdict should not be set aside, and a new trial allowed.

Ewing, for defendants, opposed a new trial.

1. Because there had been three verdicts for the defendants, for the land in question; and the justice of this case is in favour of the defendants. The title of the plaintiff was supported by strict principles of law, and they will not be enforced by Courts, on a motion for a new trial in an ejectment. It has only been of late, that Courts grant new trials in ejectments, when the verdict is for the defendant; as the plaintiff may resort to a new action. Cases cited, Salk. 646. 1 Bos. & Pul. 338. 6 Bos. Ab. 662. 1 East, 583. 2 Bin. 129. 4 Term. Rep. 468. 1 Burr, 11. 54. 2 Burr, 644. 273-4. 3 Burr, 1306. 2 Term. Rep. 4. 1 Mass. Rep. 237. Cowp. 601. 2 Bin. 333. 3 Idem, 317.

2. That if the Court grant a new trial, they will impose terms on the plaintiff, and oblige him to pay the costs of all the former ejectments, none of which have been paid. Bull, N. P. 111. 4 Dal. 353.

3. That Hannah Willis, the plaintiff, is an infant, and was born in the state of Pennsylvania, and was, for the purpose of having this suit instituted, removed into the state of Maryland. As a minor, she could not change her domicil, so as to give the Court jurisdiction; and that having, since the suit was instituted, returned to the state of Pennsylvania, the Court will not aid the imposition which has been practised, by ordering a

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Lessee of Willis vs. Bucher et al.

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new trial. 4 Dal. 331. 3 Dal. 384. 3 Cranch. Rep. 5 Cranch. 287.

An affidavit, taken *ex parte*, was read; stating the facts of the birth of the plaintiff in Pennsylvania; her infancy and removal to Maryland, and subsequent return, and present residence in this state.

Binney and Tilghman, contra, contended, that the verdict was against both law and justice, and the whole community are interested in the preservation of the rights of Courts to decide the law in civil cases. In the Supreme Court of the state of Pennsylvania, a new trial had been granted in an ejectment for this land; and the Court said, they would grant new trials, where the verdict of the jury was against law. The case was, on both sides, considered as a question of law; the jury paid no attention to the argument; and some of them went out of the Court-room while it was going on.

That this is the first suit instituted by the present plaintiff; and this case differs from that brought in the Court of Pennsylvania, in which an allegation of fraud was a part of the defence. The plaintiff claims under the will of her grandfather, and not under her father, to whom fraud was imputed.

2. The Court will not impose the costs of suits, to which the plaintiff was not a party, and which were decided in another Court.

3. As to the citizenship of the plaintiff, it was not objected to at the trial, and cannot now be brought into question, on an *ex parte* affidavit. There is nothing illegal in removing to another state, to give jurisdiction to this Court; and a return to the state, after suit brought, does not change or affect the rights of the plaintiff.

The only course the defendants' counsel could adopt, in reference to the jurisdiction of the Court, would be, to move to dismiss the suit; and the affidavit could not be read to support the motion, although it might be the foundation of a rule to show cause.

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*WASHINGTON, Justice.* When the motion in this case was made, it was considered that a new trial was a matter of course, as the verdict of the jury was in direct opposition to the express charge of the Court, upon a plain matter of law.

It gives us great satisfaction, that, during the sixteen or seventeen years, in which we have presided in this Court, this is the second case, where, upon a dry point of law, a jury has given a verdict against the opinion of the Court. It is not on the ground of dissatisfaction at the conduct of the jury, who are respectable men, and no doubt thought they were doing right, that the Court will set this verdict aside. It is important that the law should be adhered to, and that the rights of Courts should be preserved. We should sit here for a very poor purpose indeed, and should disregard our duty and our oath, if we should submit to verdicts against law. The safety, and happiness, and prosperity of every one, are deeply interested, that if a jury undertake to decide, and does decide against the law of the land, their verdict should be corrected; for if they err, and the Court has no control over their decision, where is the remedy for any injury or wrong an individual may sustain by their verdict? But if we make a mistake, the Court above will correct our errors.

We never interfere with the facts of a case, and always leave them to the jury, as proper for their examination and decision; stating such of them only as are necessary to apply the law, and expressing our opinion upon the law, so that either party may take an exception to it, and have the benefit of such exception.

As to ejectments, there may be cases, where Courts, after two or three verdicts, will not interfere, and where the justice of the case is clearly with the verdict. But in this case, every thing is in favour of the plaintiff,—both the law and justice are with her. The only thing claimed by the defendants, was founded on facts, which the Court would not allow to be given in evidence on a trial at law; as the relief of the party upon them should be asked on the equity side of the Court. The plaintiff

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*Lessee of Wills vs. Bucher et al.*

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here claims under the bounty of her grandfather, and not under her father, to whom these facts relate. The Court, as at present advised, will not hesitate to set aside a verdict in ejectment, when against law.

With respect to the affidavit, it is not evidence for any purposes, either to continue the motion, or in reference to a new trial. If the case goes off to another Court, the party will have all the advantage of the facts relative to the jurisdiction. The Court would give the defendants leave to enter a special plea to the jurisdiction; or, upon notice, they might have the benefit of all the facts upon the trial; or a motion may be made to dismiss the suit, and they may bring forward proper evidence.

*Rule made absolute.*

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Joseph Bas et al. vs. Steele.

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## JOSEPH BAS ET AL. vs. JOHN STEELE, Esq.

The laws of the United States do not require a person, in order to entitle himself to a clearance, to produce to the collector, a certificate of his having complied with the Inspection Laws of the state; unless the law of the state requires it.

When one party in a cause wishes the production of papers, supposed to be in the possession of the other, he must give to him notice to produce them. If they are not produced, he may give inferior evidence of their contents; or may draw inferences from their non-production, favourable to the other side. But if it is his intention to nonsuit the plaintiff—or if the plaintiff, requiring the papers, means to obtain a judgment by default, under the 15th section of the Judicial Act, he is bound to give the opposite party notice, that he shall move the Court for an order upon him, to produce the papers; or, on failure to do so, to award a nonsuit or judgment, as the case may be.

No advantage can be taken of the non-production of papers, unless ground is laid, for presuming that the papers were, at the time the notice was given, in the possession or power of the party; and that they are pertinent to the issue. In either of the cases, the party to whom the notice was given, may be required, to prove, by his own oath, that the papers are not in his possession or power, which oath may be met, by contrary proof, according to the rules of equity.

In an action for a tort to personal property, possession, accompanied by an assertion of ownership, is *prima facie* evidence of property. Documentary evidence, is only necessary when the ownership is denied, and the production of papers is called for.

The register of a vessel is not, *per se*, evidence of ownership.

In an action against the collector of the customs for refusing a clearance, upon a count, stating that the plaintiff was the owner of the vessel—laden with a cargo, of a certain value, the allegation is sufficient, as to ownership of the cargo.

In actions of contract, or tort, damages, which materially and necessarily arise from the breach or *gravamen*, need not be stated; as they are covered by the general damages laid in the declaration. Special damages, not necessarily implied, cannot be recovered, unless specially stated; and, although the plaintiff has given evidence of special damages, without ob-

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jection, by the defendant, yet the defendant may object to their allowance, on the trial.

The general nature of the cargo, being provisions—the blockade of the river Delaware, by the enemy, and a license to the plaintiffs, being neutrals in the war, from the blockading squadron, will not authorize the collector to refuse a clearance; there being no law to authorize such refusal.

Whether a neutral, within the territory of one belligerent, commits a crime against that belligerent by an intercourse with the enemy, must depend on the nature of that intercourse.

If the owner contemplated an illicit intercourse with the enemy—such as to supply him with provisions, the clearance of the vessel might be withheld by the collector.

The collector must show probable cause for his suspicions; and if the party, having it in his power to remove the suspicions by evidence, fails to do so, he is not entitled to damages for the refusal of the clearance by the collector.

**T**HIS action was brought to October sessions, 1813, to recover damages from the defendant, who was collector of the port of Philadelphia, for refusing a clearance to a Spanish vessel, owned by the plaintiffs, who were merchants residing at Havana.

The vessel, called *Los Dos Amigos*, having on board a cargo of sugars, arrived at Philadelphia, early in March 1813, consigned to Escardo, one of the plaintiffs, who came in her as a passenger. Soon afterwards the blockade of the Delaware, by the British, took place; and the *Dos Amigos* was detained. The owner of a Spanish vessel, also in the port of Philadelphia, with the consent of the proper authority, went down to the blockading squadron, to obtain permission to sail with a cargo of flour, for Havana; and he was requested by Escardo, to ask permission for the *Dos Amigos*, to carry a cargo of potatoes and onions to the same place. On his return, he informed Escardo that this permission was granted; but that it was a verbal license, the British commander having refused to give one in writing. A cargo, consisting of onions and potatoes, the growth of 1813, was immediately purchased by

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Joseph Bas et al. vs. Escado.

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Escado; the cost of which was 2,083 dollars, 88 cents; and, on the 21st of July, accompanied by the captain of the *Dos Amigos*, he went to the custom-house; where the captain delivered in duplicate, a manifest of the cargo, in the usual form, one copy of which was signed by him, and, with the oath required by law, written out. A clearance was not granted, and the owner and master were informed by the deputy-collector, the defendant being absent, that from the nature of the cargo, it being composed of articles of a perishable nature, it was believed to be intended for supplies to the blockading squadron. It was stated by Escado, that the vessel had a license from the British commander, to carry the cargo to Havana; and the evidence as to this admission, whether the license was declared to be verbal or written, was contradictory. The deputy-collector required the production of the license; and the plaintiff, Escado, denied any intention to furnish supplies to the hostile vessels. Two or three interviews between Escado and the deputy-collector took place; and the clearance not being granted, counsel were employed by the plaintiffs, who demanded from the defendant, a clearance for the *Dos Amigos*, and notified him of a claim for damages; should he continue its refusal. A correspondence took place on the subject; surveys were held on the cargo on the 27th and 28th of July, and it was found in a perishing state; and on the 2d of August, it was sold under the direction of an auctioneer, for 187 dollars 33 cents.

The declaration contained four counts: 1st. For refusing a clearance to the *Dos Amigos*, laden with a cargo: 2d. For refusing the clearance maliciously: 3d. For refusing the clearance, and stating that the manifest was sworn to by the captain: 4th. For refusing it, and stating that the master was ready, and offered to swear to the manifest.

The evidence of ownership of the vessel, was the possession of Escado, in the name of the plaintiffs; and the reputation of such ownership, at Havana. The fact of the refusal of the

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clearance, was shown by the correspondence between the counsel of the plaintiffs, and the late A. J. Dallas, esq. who was counsel for the defendant; in which this refusal was admitted, and the reasons for the same stated.

The defendant's counsel had, soon after the suit was commenced, given the plaintiffs notice to produce certain documents and papers on the trial; and, on their being called for, it was stated by their counsel, that no such documents or papers were in their possession, or existed, with the exception of the log-book called for, which had accompanied the vessel, on her return to Havana; and an account of the particulars of the cargo, and the receipt of the persons from whom it had been purchased, for the cost thereof; which was offered as a bill of parcels.

C. J. Ingersoll, for the defendant, moved for a nonsuit, on the following grounds:—

1. That the manifest delivered to the collector, by the captain of the *Dos Amigos*, was not sworn to.
2. That notoriety of ownership, and possession of the vessel by one of the plaintiffs, for all the owners, was not sufficient to support this action for damages, *ex delicto*.
3. That, according to the provisions of the 15th section of the Judiciary Act, Laws, United States, vol. ii. page 65, the non-production of papers, after notice, gives the party calling for them, if defendant, a right to a *non pros*; if plaintiff, to a judgment by default.

The counsel for the plaintiffs opposed the nonsuit, alleging that one of the counts of the declaration, averred a readiness on the part of the master, to swear to the manifest; and that as the oath was subscribed by the master, the jury might infer that it was sworn to. That notoriety of ownership, and actual possession of a chattel, was the usual and sufficient evidence of ownership; and, certainly, sufficient to permit the question to go to the jury; and that the provisions of the Act of Congress, relative to the production of papers, applied only



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where a motion had been made to the Court, for an order on the party, to produce the papers, followed by notice thereof, and some evidence that the party called on for them, had them in his possession, and that they were pertinent to the issue.

*WASHINGTON, Justice.* With respect to the objections on account of the Inspection Laws, the answer of the plaintiffs' counsel is sufficient. The Act of Congress does not require the collector to interfere, unless it appears that he is called on so to do by some state law.

As to the ownership of the vessel and cargo, it is a sufficient answer to this motion, that some evidence has been given, which may, in the opinion of the jury, be sufficient to prove this fact; and the rule of this Court, and of every Court is, that where such evidence is given, the Court will not take the cause from the jury. As to the manifest, upon being reminded of the counts in the declaration, which aver a readiness to deliver a manifest, these difficulties disappear. The manifest is not sworn to; it is filled up and signed, but the oath was not administered; and it would not in this form be sufficient to support an indictment for perjury. But it is sufficient, under these counts, if the master did all in his power—if he showed himself in readiness to take the oath. The only question with us is, whether enough is shown, to allow the jury an opportunity to draw an inference. Two facts are made out now, which did not appear before. The master, with Escardo, was seen to go two or three times towards the custom-house, professing that he meant to go there; and, at that time, the manifest was in the possession of one of them. Taking these circumstances in connexion with the manifest having been left with the collector; and that the collector does not assign as a reason, why the clearance was refused, that the master would not swear to the manifest,—there is enough, from which the jury may infer, that the manifest was delivered to the collector, by the master, and that he was ready to take the oath; and the objection stated,

is not that he refused the oath, but that there was a suspicion of an intended infraction of the law, by furnishing supplies to the enemy.

In the former case, the Court stated that the assigning of one reason, did not exclude a right in the collector to give another, if the objections arising from the first should be cleared up. The case is now changed; because now it appears, that a manifest may have been signed and delivered to the collector—and, as another reason for refusing the clearance was assigned, this furnishes an additional fact, from which the jury may infer a readiness on the part of the master, to swear to the manifest.

The remaining point is important and novel; and has not yet been decided in the Supreme Court, in this Court, or in any other Circuit Court, so far as we are informed.

It is not difficult to give a construction to the section of the Act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for, are not produced, he may be enabled to argue against the party not producing them to the jury: 2d. This object may be to obtain evidence from the contents of the papers called for: and, 3d. To move the Court for a new suit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section, by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The Court will require reasonable proof of the possession, and of the pertinency of the papers.

If the object of the party is to avail himself of the provisions of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice, will come prepared to meet it.

In any such case, when the party is called on to produce papers, he may make oath that he has them not; and thus extri-

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cate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them.

Whenever a judgment by default, or a nonsuit, is intended to be claimed, the notice to produce papers, must give the party information that it is intended to move for a nonsuit, or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the Court, under this section of the Act of Congress.

*Nonsuit refused.*

The nonsuit having been refused, and the case submitted to the jury, the counsel for the defendant contended—

1. That the receiving a license from the enemy of the United States, by the owner of the *Dos Amigos*, destroyed the neutral character of the vessel, and justified the refusal of the clearance.

2. That as the declaration stated the plaintiffs to be owners of the vessel, "laden with a cargo," this was not a sufficient averment of ownership of the cargo, to authorize a claim for damages for its loss.

3. That there was no evidence to show a demand of a clearance from the collector, after the 21st and 22d of July, and subsequent to the explanations given in the correspondence; and that the failure to make such a demand, as it might have been granted, was an answer to this suit.

4. That a clearance is not a necessary document for a foreign vessel, sailing from a port of the United States; and therefore, the refusal of the clearance was not the cause of the damages sustained by the plaintiffs. The counsel for the defendant cited, 1 Chitty on Plead. 146-7. 486-7. 1 Condry's Marshal, 407. 1 Wheaton's Rep. 431. 4 Rob. 284. 6 Rob. 131. 4 Rob. 65. 8 Cranch, 384.

On the part of the plaintiffs, it was argued—1. That a neutral, not an inhabitant of the place, has a right to obtain a license from the enemy of the nation, when he may wish to proceed to a port in his own country with a cargo, and that such an act was no forfeiture of his neutral character.

2. That the averment in the declaration, that the plaintiffs were owners of the vessel, laden with a cargo, was sufficient; and that if it was not, the jury might give damages for all the consequences of the detention of the vessel by the defendant, even without a direct averment of ownership in the cargo. It was also said, that as the defendant had not objected to the evidence, given by the plaintiffs, of ownership in the cargo; which evidence was intended to apply to that part of the declaration; they could not now object to the effect of such evidence.

3. That a new demand of the clearance was not necessary; and that had the defendant determined to grant a clearance after the explanations, he should have notified the plaintiffs of his readiness so to do.

4. That a clearance is necessary to every vessel sailing on the ocean, to protect her from molestation, and is the usual and proper document for that and other purposes;—that without a clearance, the *Dos Amigos* would have been arrested by the fort in the Delaware—by the officers of the customs in the District of Delaware—by the gun-boats stationed at the mouth of the harbour; and would have been interrupted by any cruiser she might meet on the ocean.

*WASHINGTON, Justice*, charged the jury. This is an action brought by the owners of a vessel, laden with a cargo, against the collector of the port of Philadelphia, for having refused the vessel a clearance, in consequence of which the cargo was lost; and damages are claimed, as a compensation for the same.

We will lay the case before the jury, under the following

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heads, which will embrace all the arguments of the counsel on both sides, and we shall make such observations upon them as apply.

1. The first question is, was a clearance asked, and refused?

2. Are the plaintiffs the persons to complain of the refusal?

3. Did the plaintiffs perform all that by law they ought to have done, in order to entitle themselves to call for a clearance?

4. To what extent can damages be claimed, if the plaintiffs are entitled to any?

Lastly. Can they recover these damages from the defendant?

1. Was the clearance refused? The correspondence between the parties, has been read repeatedly; and as it is the duty of the Court, to give a construction to written papers, they will observe upon it.

The plaintiffs' counsel in their letter to the defendant, complain of the refusal of a clearance to the Dos Amigos; and the answer of the defendant acknowledges the refusal, and justifies it on certain grounds stated therein. This supports the charge of a refusal by the defendant, and that the plaintiffs complained thereof.

But if there is any doubt on this subject, Mr. Wilson's acknowledgment removes it. He states, that two persons, one of whom was the master of the Dos Amigos, came to the custom-house, and applied for a clearance, and he having declined to give the explanations asked, the clearance was not granted; and O'Conway states, that at two interviews, the officer was asked if the vessel would be permitted to depart; and he answered that she would not; as the British vessels were in the mouth of the bay, and the cargo might fall into their hands.

But it is said, that if the clearance was refused when first applied for, the subsequent negotiations, between the counsel of the plaintiffs and of the defendant, kept the affair in suspense until the 28th of July, when a new demand should

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have been made, and was necessary; in order to enable the plaintiffs to recover in this action.

This is not the law; nor is it reason. Because, after the refusal of a clearance on the grounds stated, and the plaintiffs had said they would look to the collector for damages, if his suspicions had been removed, it was the duty of the defendant to say to the plaintiffs, I will give the vessel a clearance. If he was not satisfied with the explanations offered by the plaintiffs, to remove those suspicions, he must stand or fall before the jury, by the propriety of the reasons of his refusal. The plaintiffs had done enough.

2. Are the plaintiffs the persons entitled to complain of the refusal?—have they given satisfactory reasons to the jury, to show they are the owners of the vessel?

The law has been correctly stated by the plaintiffs' counsel. Possession and assertion of ownership, are sufficient evidence thereof. Documentary evidence is not necessary, unless the asserted ownership is denied, and the party has been called on to produce such documents. The evidence in this case is, that Escardo was here, in possession of the vessel, and asserted he was the owner for all the plaintiffs; and he afterwards proceeds to manifest this, by instituting the suit in the name of all the owners. Longfausc was at Havana, saw the owners there, heard them assert that they were owners of this vessel; and he states, that it was there a matter of notoriety they were the owners. The register of the vessel, if it were produced, would not be sufficient evidence, and would be no more than this, that it would be in writing; nor would it be equal to this, if it were not accompanied by possession. This is, however, a question of evidence, on which the jury must decide.

3. Did the plaintiffs do all that by law they ought to have done, in order to entitle the vessel to a clearance?

What does the law require? That the master shall deliver to the collector, a manifest of the cargo on board the vessel, stating the articles of which the same is composed, and the

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prices thereof, to be signed and sworn to by him. What is the evidence on this subject? Mr. Wilson, the deputy-collector, states, that "on the 21st of July 1813, the captain of the Spanish vessel, with a foreigner, not known to him, came to the custom-house. Two outward manifests were laid on the desk at which he stood, either by the captain or the gentleman with him. He took them up and examined them as was usual. He observed to the captain, and to the gentleman with him, that the cargo was of a very perishable nature, and that he doubted whether it could reach Havana in a state proper for use, and was therefore intended for the British squadron; and he referred particularly to the articles being the growth of that season. They declared they were *bona fide* destined for Havana, and they withdrew."

From this, the following facts appear as applicable to the manifest. Two manifests, filled up, and signed, were placed on the desk of the deputy-collector; were examined by him, and no objections made to them; but he stated a suspicion, that the cargo could not reach Havana, and that, therefore, it was intended for the British squadron. Mr. Dallas states, in his letter, that this would be no obstacle to granting the clearance, if the grounds for suspicion of illicit intercourse were removed. This admits, that the manifest was tendered, and that the captain was ready to swear to it; and the Court think it was the duty of the collector to require it to be sworn to, if he thought it necessary. Two manifests were laid on the desk: only one has been produced on notice; and the jury will judge why the other has not been produced. The Court has no difficulty in saying, that these circumstances amount to evidence, that the manifest was sworn to, or that the master was ready to swear to it; and that the plaintiffs did all, or were ready to do all, the law required of them.

4. To what extent can the plaintiffs claim damages, in this case, if the jury shall be of opinion they are entitled to damages? The averment in the declaration is, that the plaintiffs "were

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the owners of a vessel, laden with a cargo," and it is said, that this is an averment of the ownership of the cargo. This will not do. They ought to have stated the ownership of both vessel and cargo, and the averment in the declaration does not mean this. It would apply as well to a vessel laden with a cargo on freight; and ownership in the cargo does not follow from it.

What is the rule of law as to damages? it has been admitted, on both sides, that, whenever the declaration claims damages, whether in contract or in tort, all the damages, which the jury can say arose out of the breach stated in the declaration, may be given, and such is the law. But if the plaintiff means to go further, he must state them specially, as well to give notice, as that, otherwise, the evidence will not fit the declaration, and these must always correspond.

It was argued, but not relied on by the plaintiffs' counsel, that this is a rule of evidence and not of compensation; and the defendant having allowed evidence to be given of the value and loss of the cargo, he could not afterwards oppose its effect, in ascertaining the extent of damages.

There are some instances, where, after evidence has been admitted, the Court will not permit counsel to object to its influence. Thus, when the signatures to a note have been admitted, the party shall not say, you cannot claim damages for the note, because this would be a trick; and having suffered the note to go to the jury as proved, he shall not afterwards oppose its operation upon them. But whenever the case is, as in the present cause, the rule is otherwise. Does, or does not, the evidence fit the declaration? If it does not, it is now too late to inform the jury they ought not to regard it.

What are the damages which arose out of the case stated in the declaration in this cause? The owners of a vessel sue the collector for refusing a clearance of a vessel with a cargo on board. Freight undoubtedly is lost by the prevention of the voyage. If the cargo belonged to any body else, or to them-



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selves, the loss was sustained and may be recovered. The owners of a vessel are equally entitled to freight, to whomsoever the cargo may belong. As to the amount of this loss, it is properly within the province of the jury to ascertain it, and the Court will not attempt to state it.

Lastly, can these damages be recovered from the defendant? The defendant has produced evidence of circumstances to justify his conduct; and various grounds of defence have been taken by his counsel. In the origin of the case, but one objection was made to granting the clearance—a suspicion of illicit intercourse with the enemy; subsequently there was another—that the plaintiffs had in their possession a license from the blockading squadron, which it was their duty to produce, to show whether it was an authority for the vessel to proceed to Havana. The grounds of suspicion of illicit intercourse were, the general nature of the cargo, it being provisions;—the blockade of the Delaware, and sailing under a British license. All these are put together, because they admit of one answer; they did not justify the collector. A neutral vessel, in a blockaded port, takes a cargo on board, and asks leave to depart. The collector says no: you have a cargo of provisions and a license. The answer is, I have a right to go; and what is it to you if I have a license? The blockading squadron may prevent it; I have a right to run the risk, and you cannot interfere. The nation may prevent it; but an executive officer cannot. If Congress did not think proper to make such a law, the collector could not make it, and say, you shall not go. As to the license, the plaintiffs had a right to take it; and the blockading squadron had a right to give it; and the reasons given by the Supreme Court, against an American citizen taking a license, do not apply in such a case. The American citizen, by taking a license, takes side with the enemy; and as, in time of war, every member of the nation is considered ~~as~~ war, he shall not be at peace. But these reasons do not apply to a neutral. He can go into a blockaded port, and can go out, if the blockading force will permit it; and

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it is not for any officer of the port to say, he shall not go. The Act of Congress, relative to licenses from the enemy, does not apply,—First, because it was passed after the cause of action arose. Secondly, because Escardo was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there; otherwise, all neutral trade would be destroyed. Going to a place to obtain a cargo, and coming away, does not give a neutral a domicil, or make him an inhabitant.

If the circumstance of the blockading squadron having been at the time in the mouth of the Delaware, is a justification of the defendant, it would amount to this; that, although Congress had repealed the embargo, the collector had the same powers he possessed when the embargo was in force. Suppose any citizen had attempted to go; could the collector stop him because he might fall in with the enemy? If no law has been produced to authorize the collector to refuse it, he ought to have granted the clearance.

Intercourse with the enemy has been alleged against one of the plaintiffs, and this was never thought of by the collector, but is the suggestion of counsel. Intercourse with the enemy, by citizens of the United States, would have been improper; but in a neutral, it is not necessarily a criminal act. Such intercourse might be criminal, as giving information; but when it had been ascertained, that it amounted to no more than procuring a license to go to sea, with a cargo, it was not criminal. But, suppose it had been so; what had the collector to do with it? The vessel might have gone out, and Escardo ~~had~~ been indicted.

The case of *The Tulip* has no application. There, the American vessel carried out important despatches from the British minister, which, if she did not, at sea, fall in with a conveyance for them, she was to land in some part of England or Ireland; and the Court had no difficulty in condemning her.

The case comes to this,—the collector had two conflicting

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duties imposed upon him; one to the individual who asked a clearance; the other to his country. If the destination of the vessel was the enemy, he had a right to refuse a clearance; if not, and there were not circumstances to warrant his suspicions, he had no such right. He was to judge upon circumstances, and to proceed on such ground, as that any just man could say, there did exist reasons sufficient to authorize the belief, that this was the destination of the vessel; and if the jury, carefully and coolly examining all the reasons, think he had just grounds for the suspicion, they will find a verdict in his favour.

The Court then went into a minute examination of the evidence which had been adduced by the defendant; and concluded by stating; that if, upon the facts, the jury thought the defendant had just and reasonable grounds for his conduct, he was not answerable; but if they did not think so, they would find for the plaintiffs.

After the Court had concluded the charge, Mr. C. J. Ingersoll requested, that the Court would instruct the jury, whether, if the license to the *Dos Amigos* was or was not in writing, and the deputy-collector misunderstood the plaintiff Escardo in relation to it, it was not the duty of Escardo to explain the circumstance.

*Washington, Justice.* If Mr. Wilson, the deputy-collector, said to Escardo, I understand you have a license in writing, and I ask you to show it, and he was silent and did not explain it, the consequences would be the same, and the defendant would have been justified. Still, the jury will have to determine on the accuracy of Mr. Wilson's recollection; not on his veracity, for that has not been doubted.

The Court say nothing about the point which was mentioned, whether the collector is answerable for the acts of his deputy. He is certainly answerable for all his acts.

*Verdict for plaintiffs.*

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Denniston et al. vs. Imbrie.

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## DENNISTON ET AL. vs. IMBRIE.

If a debtor remit a bill to his creditor, in payment of the debt, and he receives it as such, and credits the debtor, it is a payment; and he can only sue the debtor as endorser; and if he neglect to present it in time for acceptance and payment, and to give notice of its dishonour, he makes the debt his own; whether the drawer had funds in the hands of the drawee or not.

A usage to add interest at the end of the year, to the annual account, and interest on the balance, does not apply in a case in which the commercial intercourse between the two countries in which the parties reside, had ceased, when the account was transmitted; nor will it authorize the creditor to make other rests in the account.

If an alien enemy has an agent here, and this is known to the debtor, interest ought not to abate during the war.

**ACTION** by the plaintiffs, merchants of Glasgow, for goods shipped to the defendant, a merchant of Philadelphia.

The defendant claimed, amongst others, the following credits:—

1. The amount of a bill of exchange for £300 sterling, drawn by Eves & Wistar in favour of the defendant, on Barber & Co. of Liverpool, at sixty days, payable in London. This bill, which bore date the 2d of October 1806, was enclosed by the defendant to the plaintiffs, with directions to place the same to his credit. On the 6th of November it was noted for non-acceptance, and for non-payment on the 30th of January 1807. The protest for non-payment, states, that the drawees were asked, whether, if the bill had been presented for payment when at maturity, they would have paid it; and was answered, that they would not, for want of funds of the drawers; but that it was probable, Mr. Guest would have provided for it.

This bill was credited by the plaintiffs to the defendant, in

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their account, on the 6th of November 1806, and was charged to him on the 24th of February 1807. It was returned to the defendant, in a letter from the plaintiffs, dated the 31st of January 1807, (which was the first notice the defendant had of its dishonour,) in which they admit, that it had been overlooked, and had not been presented for payment at the proper time; but that the validity of *their claim* against the drawers, was not impaired, as payment could not then, or at any subsequent period, have been obtained.

On the 14th of March 1807, the defendant wrote to the plaintiffs, that not having heard any thing respecting the bill, he presumed it had been paid. In a subsequent letter, in answer to the plaintiffs' of the 31st of January, he regretted that the tottering circumstances of the drawers of the bill, rendered it doubtful if they would be able to take it up; but promised to do what he could to secure it; stating, at the same time, that in consequence of their negligence, he should consider the loss as the plaintiffs', should a loss happen.

By a letter from the drawees to the drawers, inclosed in another from the plaintiffs to the defendant, and referred to by the plaintiffs, it appeared, that if this bill had been presented for payment in time, it was probable it would have been provided for.

The reading of this letter was objected to by the plaintiffs' counsel, and allowed by the Court to be read, as part of the correspondence; but without deciding how far it was to be considered as evidence of the facts it contained.

This letter spoke of Mr. Guest, in relation to the payment of this bill; and the plaintiffs offered to read a letter from Mr. Guest, explanatory of it, which was overruled by the Court.

Evidence was given, both by the plaintiffs and the defendant, as to the circumstances of the drawers of this bill, from December 1806 to April 1807, when they stopped payment; to show, on the one side, that if the bill had been duly protested,

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and notice given, payment might have been secured ; and on the other, that it could not.

2. The next credit claimed, was for an abatement of interest during the late war. It was proved, that one of the plaintiffs was in New-York during a part of the war, from some time in 1813, of which the defendant had notice.

3. The plaintiffs had been in the habit of forwarding their accounts annually to the defendant, from 1806 to 1809 ; in which the balance of interest was credited, or debited, as the case might be, and added to the balance of principal, on which aggregate, interest was regularly charged. From 1809, the mercantile transactions between these parties ceased. Some time in the year 1814, the agent of the plaintiffs called on the defendant with his account, stating the principal and interest to that time ; and the demand being resisted, or not complied with, this suit was brought. The defendant objected to paying interest on interest, after the commercial transactions between these parties ceased, in 1809.

Evidence was given to prove, that the uniform usage of this trade was, for the merchant in Great Britain, to send forward annually his account current to his correspondent here, and to add the balance of interest to the principal, and this aggregate to carry interest.

Levy, upon the first point, contended, that want of effects in the hands of the drawees, or other circumstances, showing that no injury was sustained by an omission to protest in time, and to give due notice, would not invalidate the claim of the holder. *Chitty on Bills*, 68. 86.

2. Upon this head, he relied upon the treaty of 1794, between Great Britain and the United States, 10th art., and upon the unreasonableness of abating interest during the war. But in this case, the plaintiffs were in the United States, of which the defendant had notice.

3. On the third point, he relied on the usage, as proved, and cited 1 Vern. 194. 1 Swift's Laws of Connecticut, 388-9.

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Chauncey, and Binney, for the defendant, on the first point, cited Chitty, 224. 158. 162. Lovelace, 80, 81. 16 East, 247. 3 Johns. Cases, 5. 12 Mass. Rep. 89. 10 Idem, 52. 4 Cra. 141. 2 Caines, 344. 11 East, 113. Chitty, 130. 3 Bos. & Pul. 241.

2. They objected to the account, only so far as interest was compounded, after 1809, when all transactions between the parties ceased, and the annual accounts current were not sent in.

3. They relied on the decision of this Court, in the case of *Conn vs. Penn*, during this term.

*WASHINGTON, Justice*, charged the jury. The first point to which we shall draw your attention is, the credit claimed by the defendant on account of the bill of exchange, drawn by Eves & Wistar on Barber & Co. in favour of the defendant, and by him remitted to the plaintiffs, on the 8th of October 1806; which the plaintiffs were desired to place to the credit of his account.

This bill was received early in November of the same year, and was credited on the 6th of that month. It was noted for non-acceptance on the same day; and, of course, was at maturity on the 6th and 9th of January, 1807. It was, however, not presented for payment till the 30th of that month; and was then noted for non-payment. It was charged to the defendant, on the 24th of the succeeding month. Notice of the dishonour of the bill was given to the defendant, by a letter from the plaintiffs, bearing date the 31st of January.

We forbear, at this time, to notice more of the evidence relative to this bill, lest it should be supposed by the jury, or by others, that the circumstances detailed in that evidence have any influence upon the opinion of the Court.

We understand the law to be, that, if a debtor remits to his creditor a bill of exchange, in discharge, or on account of the debt he owes, the creditor may receive it as such, or decline to do so, and return it; or he may present it for acceptance and payment, as the agent of his debtor. If he gives his debtor

credit for the amount of the bill, as payment, or in any other manner accepts it as such, it is a payment of so much of the debt. He stands then as an endorser of the bill for consideration paid, and may have his recourse against the drawer and endorsers, in case it should be dishonoured. But if he has been guilty of negligence, in not presenting the bill in time for acceptance and payment, and giving timely notice to all those he means to resort to, of the dishonour of the bill, he stands in the situation of all other holders of bills of exchange. He can never re-charge the bill to his debtor, and do away the credit once given, or to which he was once entitled. This has been decided in this Court, in two or three cases. If a doubt could exist, whether this bill was received by the plaintiffs, in part discharge of the debt due to them, and that they had made it their own; their letter of the 31st January 1807, to the defendant, would be sufficient to remove it.

What, then, is incumbent on the holder of a bill of exchange to do, in order to charge the drawer and endorsers, in case it should be dishonoured? He must, in due time, present it for acceptance; and when at maturity, allowing the days of grace, he must present it for payment. If acceptance or payment be refused, he must cause it to be protested, or, at least, noted for non-payment, on the day of refusal; and he must also give timely notice of the same to the drawer and endorsers, against whom he means to resort.

What was the conduct of the plaintiffs in relation to this bill? It was noted for non-acceptance on the 6th of November, and was neither presented at maturity, nor protested for non-payment. Payment was not demanded at any time; not even on the 30th of January, upwards of 20 days after it should have been; since it appears by the protest, on that day, that the only inquiry made of the drawees was, whether they would have paid, had the bill been presented in due time? No notice was given of the non-acceptance, until after the informal demand of payment 20 days after it was payable. It is said that the drawers



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had no funds in the hands of the drawees, and therefore a timely protest and notice were unnecessary. It will readily be admitted, that, if this were an action against the drawers, they could not defend themselves, by alleging the negligence of the holder in these respects, if they had no funds in the hands of the drawees, or had no right to draw upon them. But as to the endorser, it is perfectly immaterial whether the drawers had authority to draw, or not. The implied contract, which, by his endorsement, he entered into with the holder, was to pay upon condition that the bill was duly presented and protested, and notice given to him of the refusal of the drawees.

It is contended, that if all these formalities, as they are styled, had been strictly attended to, still the situation of the defendant would not have been improved, by reason of the failing circumstances of the drawers. If the fact were so, (and there is strong evidence to the contrary,) still the Court and jury have nothing to do with considerations of this nature. The rule of law is imperative; and if it were subject to be controlled by such circumstances, it would cease to be a rule.

Another objection made to this credit is, that the defendant, in a letter addressed by him to the plaintiffs, in the year 1809, stated that he had some small deductions to make from his account; which the counsel considers as amounting to a promise to relinquish his claim to this credit. How far he would have been bound by such a promise, had it been distinctly made, is a question not necessary to decide. But, as the defendant, from the time he first had notice of the plaintiffs' irregularity in respect to this bill, had uniformly insisted, that the plaintiffs had made the bill their own,—it would be giving to the general expressions of the letter, a most extravagant and unnatural construction; to make them amount to a promise to submit to the loss of so large a sum of money. This objection, therefore, cannot be sustained.

The last objection made to this credit is, that the bill having been returned to the defendant, and retained by him, to this

moment, so far as appears, he ought to be now debited with the amount.

The answer to this is obvious. The defendant received the bill, as the agent of the plaintiffs, to collect the amount for the plaintiffs, from the drawers, if he could. He did receive a small part of it from the assignees, and debited himself with the same, in account with the plaintiffs. If, as agent, he has been guilty of any neglect, he is answerable for the same, whenever an action is brought against him, fitted for such a case. That question cannot be investigated in this action, which is for goods sold and delivered.

Upon the whole, the Court is of opinion, that if this action were upon the bill of exchange against the defendant, as endorser, the plaintiffs, for the reasons mentioned, could not recover. Much less reason is there, for charging him with the amount of the bill, in this action; or, in other words, expunging from the account, the credit once given; and to which he is entitled in part discharge of that account.

The second question respects the mode of charging interest on the plaintiffs' account.

The Court need only refer to what was said in relation to this subject, in the case of Barclay & Co. vs. Kennedy, decided at this term, (*ante*, p. 350.) Whether the usage is sufficiently proved by the evidence, is submitted to the jury; as also, whether the mode of charging the interest in this case, is conformable with the usage so proved. We shall make but this observation; that if the usage proved, is applicable only to cases of running accounts, annually stated, and furnished to the merchants here, it will not govern a case where an account is sent, after all commercial transactions have ceased; and particularly where the adding the interest to the principal, has not received the implied sanction of the debtor; but, on the contrary, payment is refused, and a suit is brought to recover such balance. Neither would such a usage authorize the creditor

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to make other rests in the account—thereby accumulating the amount, by converting the interest into principal.

The last question respects interest during the war. The opinion delivered in the case of *Conn vs. Penn*,\* continues to receive the approbation of the Court. We think, that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate. If the agent be in the state where the debtor resides, a general knowledge of that fact may be sufficient, without bringing it home to the debtor. The debtor might have paid his debt, either to the creditor, or his agent, in this country, without the danger of violating his duty, or the laws of the land.

It is said, that the abatement of interest, during the war, upon a debt due to an alien enemy, is a hardship which should prevent the adoption of the rule which this Court has approved. If it be so, the rule must nevertheless be enforced, as we do not sit here to establish or to uphold a flexible system of laws, to be bent sometimes one way, and sometimes another, according to our notions of hardship. But even this argument, slight as its influence should be, when aimed against a legal principle, is unfounded in fact; since the creditor may always remove the objection, by having an agent on the spot, authorized to receive the debt.

\* 1 Peters's Reports, 496.

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Lonsdale vs. Brown.

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## LONSDALE vs. BROWN.

Action on a bill of exchange, by the payee, against the drawer, which he had endorsed to O., and which was by O. endorsed to C. The Court admitted O. to prove that he endorsed the bill to C., merely to recover the money, for the account of the plaintiff, and without consideration. The possession of the bill, by the drawee, is *prima facie* evidence, that he has paid all those who could claim against him, on the bill; and the endorser, O., has no interest in the event of the suit.

A commission directed to A and B, or either of them, to take depositions, authorizes the deposition of A, to be taken by B.

Where a subsequent promise, or acknowledgment of a debt is made, it may be given in evidence, to remove the bar of the Statute of Limitations; although the action be brought upon the original cause of action. But if the new promise, vary the terms of the original contract, on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence.

**ACTION** on a protested bill of exchange, dated 19th of May 1807, drawn by the defendant, at New-Orleans, in favour of the plaintiff, at sixty days after sight, on James Brown & Co. of Philadelphia, for 600 dollars—pleas, 1st, *non assumpsit*; and, 2d, *non assumpsit*, within six years; and issue joined, with leave to the plaintiff, by the agreement of the parties, to give any legal evidence to prove a new promise, or the inapplicability of the Act of Limitations.

The bill was presented for acceptance, on the 11th of July 1807, and was protested; on which protest for non-acceptance, this action was brought. It did not appear, that payment was ever demanded, or that a protest for non-payment was made; neither did it appear, that notice of the non-acceptance had been given to the defendant.

The bill was endorsed in full, by the plaintiff, to O'Neil, and

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by O'Neil to Chancellor. The plaintiff offered the deposition of O'Neil, to prove that no consideration passed from Chancellor; but that the bill was endorsed to him, as agent merely to receive the amount, for account of the endorser. This evidence was objected to, on the ground that it was calculated to discredit a negotiable paper, on which the witness had placed his name.

*By the Court.* There is no weight in this objection; the bill having got into the hands of the payee, it is *prima facie* evidence, that he has paid the amount of it, to those who had a right to call upon him; although it is not endorsed to him by O'Neil, or Chancellor, according to the late decision of the Supreme Court, in the case of *Clark vs. The United States*. 2 Wheaton, 37. In this suit, therefore, by the payee against the drawee, O'Neil has no interest; nor can it be said, that his evidence has a tendency to discredit the bill.

A commission to take depositions directed to A and B, or either of them, under which sundry depositions were taken by A, one of the commissioners; and then the deposition of A, taken by B, was offered in evidence, and objected to. But the objection was overruled.

The plaintiff offered parol evidence, to prove what was the legal rate of interest, and the damages on protested bills of exchange at New-Orleans, at the time this bill was drawn.

*By the Court.* The presumption is, that those subjects are established by some written law; and if so, the law itself must be produced. Parol evidence, to prove foreign laws, is never admitted, but in cases where it appears that those laws are unwritten.

The plaintiff proved, that in November 1809, the defendant, in a conversation with the plaintiff, expressed his regret that this bill had not been paid; and promised that if he should ever be able, though it should be ten years, he would pay it. This evidence was given to prove a new promise, so as to take the case out of the Act of Limitations.

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Messrs. J. R. Ingersoll, and Chauncey, for the defendant, objected to the plaintiff's right of recovery, on the following grounds:—

1. That the bill was not presented for payment, and that no notice of non-acceptance was given to the drawer; and that the promise in November 1809, was not binding on the defendant, unless it appeared, that he was fully informed of the above facts, and of his legal rights founded thereon. 7 Mass. Rep. 449. Kyd on Bills, 129.

2. The promise in 1809, cannot avail the plaintiff, as this suit was not brought till 1816, more than six years after it was made.

Shoemaker, for the plaintiff, contended—1. That if a bill be protested for non-acceptance, presentation for payment is unnecessary, but suit may be immediately instituted. Promise to pay a bill by the drawer, or endorser, is evidence of notice. 4 Johns. Rep. 144. 5 Idem, 248. 2 Camp. Rep. 188.

2. The Act of Limitations did not begin to run from the time of the new promise in 1809—1. Because it was conditional, to pay when the defendant was able, till which event, the plaintiff could not commence his action. 3 H. Black. 116;—and 2. Because the defendant had ten years to pay it in; which, of course, suspended the operation of the Act during all that period. He cited 5 Burr, 2630. Peake's Evid. 319. 6 Mod. 26.

*WASHINGTON, Justice*, charged the jury. This is a plain case, upon the plea of the Act of Limitations. It is admitted, that an absolute promise to pay, made in 1809, would not take this case out of the operation of the Act, unless the suit had been brought within six years after the promise was made, which this was not.

But it is contended that the promise was conditional, in two respects,—first, to pay when the defendant should be able; and secondly, at any time within ten years; and consequently, that

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the limitation did not begin to run till he was able, nor till the expiration of the ten years.

As to the first, whether a promise to pay when the defendant shall be able, be absolute or conditional, need not be decided in this case; because, if it be conditional, still this action, which is upon the original promise, cannot be supported. Where a subsequent promise, or acknowledgment of a debt, is made, it may be given in evidence, to remove the bar of the Act of Limitations, though the action be brought upon the original cause of action. But, if the new promise vary the terms of the original contract on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence, because the proof would not correspond with the allegation. The defendant could not be prepared to meet evidence, of which the declaration gave him no notice; and if the plaintiff were to state the conditional promise, in a replication, it would be a departure from the declaration. It was for these reasons, that the Court refused to permit the plaintiff to give evidence of the ability of the defendant to pay this debt.

As to the promise to pay, if it were ten years, it is subject to the same objection; and also to another. If the defendant was bound, by this promise, to pay at any time within the ten years, as the plaintiff contends he was, then the Act of Limitations began to run from the time the new promise was made, and of course this action was brought too late. If he was not bound to pay before the expiration of the ten years, then it is brought too soon. So that, take it either way, the plaintiff cannot recover.

If the true construction of the promise be, to pay, if the defendant should be able, at any time within ten years; still it would be liable to the objection before stated, that of its being conditional.

*Verdict for defendant.*

**CIRCUIT COURT OF THE UNITED STATES.**

**PENNSYLVANIA, OCTOBER TERM, 1818.**

REPORTS { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
Hon. RICHARD PETERS, District Judge.

**EVANS vs. HETTICK.**

**Action for an infringement of the plaintiff's right to the *hopperboy*, described in his patent.**

Evidence was allowed, on the part of the plaintiff, of his declarations in a particular year, that he had discovered and constructed the machine patented, all the parts of which he described. This evidence was admitted to prove, not that the plaintiff was the discoverer, but that he then asserted such a right, and described the machine.

A witness who had in use such a machine as that used by the defendant, and who, with other persons sued in similar actions with the present, had contributed a common fund, to defray the expenses of their witnesses in attending to the suits, was allowed to testify on the part of the defendant in this case. Between the contributors there was no agreement to participate in paying the damages or costs, which might be recovered against either of them in the actions. A verdict in this case, would not avoid the plaintiff's patent; and therefore, the witness had no interest in this case.

The counsel for the plaintiff, cannot ask the witness, if Jacob Stouffer had applied to the plaintiff for a license to use his *improved hopperboy*, and had offered to pay for it; it not being proved that Jacob Stouffer had a *hopperboy* of any kind, or had ever used one.



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The Court would not allow a witness to depose what he had heard said in the family of Stouffer, as to the *Stouffer* hopperboy being so called; it being merely hearsay evidence.

A deposition of a witness residing in this state, above one hundred miles from the place of holding the Court, taken under a rule entered by the plaintiff in the Clerk's Office, but not in conformity with the requisitions of the 30th section of the Judicial Act, cannot be read in evidence.

An examination of the law in relation to the taking of the depositions of witnesses, residing above one hundred miles from the place of holding the Court.

A deposition having been read without objection, cannot be afterwards rejected and withdrawn, because the Court, subsequently, refused to allow a deposition to be read, on account of an exception which would also have excluded the deposition which had been read, had it been objected to.

What questions cannot be put to a witness called as rebutting evidence.

Interest in a witness, short of that which would exclude him on the ground of incompetency, how far it should weigh.

If the patent and specification do not state in what the improvement consists, in full, clear, and exact terms, where the patent has been granted for an improvement; the plaintiff cannot recover for an alleged violation of it.

Oliver Evans's patent for the improved hopperboy, is not an exception from the general rule, either by force of the private Act, under which the patent was granted, or the decision of the Supreme Court, in the case of *Evans vs. Eaton*.

Oliver Evans's patent is not for the whole hopperboy,—whether he was the original inventor of it or not; nor does the opinion of the Supreme Court, in *Evans vs. Eaton*, sanction such a claim.

Unless Oliver Evans shows himself to be the original inventor of the hopperboy, he can claim no right in virtue of the grant made to him by the Act of Assembly of Pennsylvania, passed in 1797.

The plaintiff cannot object to the originality or priority and use of another machine, alleged to have been similar to his own, on the ground that it had gone into disuse, or was not *notoriously* in use; since it is essential to his case, to prove he was the original inventor of the machine for which he has a patent.

**ACTION** for infringement of the plaintiff's right to the hopperboy, described in his patent. Plea, not guilty, and notice

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of special matter, under the sixth section of the Act of Congress relative to patents. The evidence was the same as in the case of *Evans vs. Eaton*, (1 Peters's Rep. 322,) save that David Aby, one of the defendant's witnesses, said the hopperboy used by the defendant was the *Stouffer hopperboy*.

The following exceptions were taken to the evidence:—

1. By the counsel for the defendant, who objected to those parts of the deposition of Enoch Anderson, in which he states, "what the plaintiff told him in the year 1783, relative to a discovery, which he contemplated, and was bringing to perfection, for an improvement in the manufacture of flour; in which conversation, he described the different machines for effecting that purpose, and amongst others the hopperboy."

*By the Court.* Although the information respecting this discovery came from the plaintiff, it is nevertheless a fact, that the disclosure was made at a particular period, and the evidence to prove that fact is unexceptionable. The question is, when was the discovery made? If the plaintiff told the witness, in 1783, that he had made it, and described it, which the witness says he did; then it is clear that he made it, at that time, or at least supposed he had done so. This is all that it proves. It does not prove that he was the discoverer, but that he said he was so, at that time.

2. David Aby was called as a witness by the defendant, who, it was admitted, used a hopperboy similar to that for the use of which, by the defendant, this suit was brought. Upon his examination, on his *voir dire*, he stated; that he, together with six other persons, defendants in suits now depending in this Court for infringements of the patent on which this action was brought, agreed to contribute a fund, to defray the expenses of this witness in coming to Philadelphia, remaining here, attending to the business of these suits, and returning; and that the agreement extended no further.—That all the counsel fees had been paid; and there was no engagement on any score; and the agreement did not extend to a contribution to damages or costs.

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either in the Circuit Court, or in the Supreme Court of the United States. If he should, while attending on the trial, advance money for any purpose besides his own personal expenses, the contributors were not bound by the agreement to reimburse him.

The witness was objected to, by the counsel for the plaintiff, on the ground of incompetency. 1st. Because the tendency of his testimony was to disprove the originality of the plaintiff's invention of the hopperboy, for which he has a patent; and consequently, to induce its avoidance by the judgment of the Court, of which the witness could avail himself when the trial of his own case should come on. 2d. Because the witness was a contributor to a general fund, for the expenses of this, as well as of his own suit; and stood in the condition of the insured, under a consolidation rule, or of a commoner.

The following cases were cited:—1 Phil. Ev. 34. 43-4. 49. 50. 95. note, 53. 31. n. 45-6. n. 42. 5 Johns. 268. 1 Mass. Rep. 300. 1 Cainor's Rep. 378. 2 Day, 472.

WASHINGTON, Justice, delivered the opinion of the Court. The plaintiff's claim is to an *improved* hopperboy. If that which the defendant and the witness uses, be not that machine, there is no reason, in point of law, why the witness and the defendant may not each use the machine, which they have, without offence to the plaintiff. It is sufficient for the defendant, on the general issue, to prove that he is not guilty of using the plaintiff's improved hopperboy; although he should use some other machine called by that name, and possessing similar properties with those of the improved hopperboy; and a verdict in his favour, upon that issue, can in no respect produce the destruction of the patent; because the originality of the invention is not in issue on the plea of not guilty; consequently the witness, who owns a hopperboy similar to the defendant's, may have his wishes, but he has no interest dependent upon the event of this cause.

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2. The agreement, which is the foundation of this objection, is for a contribution to a general fund to be used in defraying the expenses of this witness, as an agent to attend to the causes in which the contributors are defendants, and as a witness in these causes; but the witness has distinctly stated, that the fund is not pledged, or intended to answer for damages, or costs, in this or in a superior Court; and that the agreement in no respects binds the parties to it, to participate in any loss, which either or all of them may sustain; or in any gain, which may result from a successful termination of the suit. Where then is the interest which can disqualify him as a witness? It must be an interest in the event of the costs;—so much money has already been contributed, and placed in the witness's hands, to defray his expenses. If it should exceed his wants, he will have to refund the overplus to the other contributors, retaining his own seventh part; and if it should fall short of supplying his wants, his associates may be bound in honour, at least, to make up the deficiency; but the fund already raised, must be applied to the objects contemplated by the parties, whatever may be the event of this suit, not dependent on that event, *but in virtue of the agreement*. If the parties are bound by that agreement, to contribute a larger sum in order to defray the expenses of this witness, they must in like manner do so; not as a consequence of the event of this suit, one way or the other, but because the agreement has bound them to do so; and even if the witness had a power, under that agreement, to increase the fees of counsel, and to incur any other expense, on account of these suits, the legal result would be the same; because the creation of these charges upon the fund raised, or to be raised, and their discharge, would be precisely the same, whether the plaintiff or defendant should gain the cause. If the former should happen, the defendant would have to pay the plaintiff his costs; but for which, neither the fund raised, nor the other contracting parties, are bound to contribute one cent. If the latter should take place, the defendant would recover his costs

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of the plaintiff; in which the other parties to the contract, are not entitled, by the terms of it, to participate. So that it is plain that the witness has not a shadow of an interest *dependent on the event of the suit*; and he is therefore competent to give testimony.

The counsel for the plaintiff, tendered a bill of exceptions to this opinion.

8. The witness, David Aby, was asked, upon his examination in chief, by the defendant's counsel, if the hopperboy used by the defendant, was like the model of the plaintiff's hopperboy, then in Court? This was objected to; but the Court decided that the question was proper; and the counsel for the plaintiff took an exception to the opinion of the Court.

9. Philip Frederick, was examined on his *voir dire*; and stated that he has in his mill what is called a Stouffer, or S hopperboy, which he described. He was also asked by the defendant's counsel, where was the first hopperboy he had seen—both of these questions were objected to by the plaintiff's counsel; and the same objections to the competency of the witness was made, on a similar ground, as to Aby's; all of which objections were overruled, and the opinions of the Court were excepted to.

10. Joseph Evans was asked by the plaintiff's counsel, if Peter Stouffer and Jacob Stouffer, offered to take from him licenses to use the plaintiff's hopperboy, and to pay for the same? This was objected to; and the Court was of opinion, that the question was improper, as it had not been proved, that Peter Stouffer and Jacob Stouffer used, or had in their mills, a hopperboy of any kind; and the opinion of the Supreme Court, in the case of *Evans vs. Eaton*, is confined to the case of an offer made by a person having a hopperboy.

Washington, J., stated that he was not willing to go a step farther than the Supreme Court had gone, in admitting such evidence. Upon the authority of *Evans vs. Eaton*, we have admitted evidence of Daniel Huston's offer to purchase a li-

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came from the plaintiff; because it appears, that he uses a hopperboy, and did so when the offer was made. This being the opinion of the Court, an exception was taken to it by the plaintiff's counsel.

6. Christian Markle, was asked by the plaintiff's counsel, to state what he had heard from the different members of the Stouffer family, as to the S hopperboy being called the Stouffer hopperboy.

The Court decided that this question was improper. The persons from whom the witness received information on this subject, ought to have been called on to give it on oath, and in a regular way. The attempt now to introduce mere hearsay evidence, of what others told the witness as to the reputation of the name and invention of the machine.

7. Michael Former's deposition, taken under a rule entered by the plaintiff in the Clerk's Office, was offered by the plaintiff, and objected to, on the ground, that the place of residence of the witness is in the District, and more than one hundred miles from Philadelphia; and the requisites of the 30th section of the Act of Congress, passed September 24th 1789, not having been observed, neither did the case come within the provisions of any of the rules of the Court.

The counsel for the plaintiff, insisted, that the practice of the Court had always been contrary to what is contended for on the other side.

*Washington, Justice.* What has been the practice in relation to this matter, is unknown to the Court; it certainly has not received our sanction, by any one decision. If the practice be contrary to the Act of Congress, it ought to be, at once, put an end to. Even a positive written rule of this Court, repugnant to that law, would be void.

The question is, whether, under the Act of Congress, and the rules of this Court consistent therewith, this deposition can be read; and this may be as fair an occasion as any that can occur, to examine and to decide this subject, that the practice of this

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ing depositions in and without the District, may be laid down and pursued, so as to prevent future mistakes.

By the Act of Congress of the 24th of September 1789, section 30th, it is enacted, that "when the testimony of any person shall be necessary, in any civil cause depending in any district in any Court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is apt and very infirm, the deposition of such person may be taken, *de bene esse*, before any Justice or Judge of the Courts of the United States, or before any Chancellor, Justice, or Judge of a supreme or superior Court, mayor, or chief magistrate of a city, or Judge of a county Court, or Court of common pleas, of any of the United States, not being of counsel, or attorney to either of the parties, or interested in the event of the cause; provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he thinks fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if he is within one hundred miles of the place of ~~prob~~ caption, allowing time for their attendance, after notification, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, as other cases of seizure, ~~seizure~~ libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before the claim be put in, the like notification as aforesaid, shall be given to the person having the agency or possession of the property libelled, at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth; and shall subscribe the testimony, by him or her given,

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after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent, in his presence. And the depositions, so taken, shall be retained by such magistrate, until he deliver the same, with his own hand, to the Court for which they are taken, or shall, together with the certificate of the reasons, as aforesaid, of their being taken, and of the notice, if any given, to the adverse party, be by him, the said magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court."

The rules of Court applicable to the matter, were framed at different times by this Court, for the purpose of regulating its practice. The first bears date on the 23d of May 1805, and provides that a party may take depositions of witnesses, being within one hundred miles of the place of holding the Court, by entering a rule in the Clerk's Office, giving a reasonable notice, which in no case need exceed ten days, to the adverse party, if living within one hundred miles; otherwise to him or to his attorney, of the time and place of taking such depositions; and the deposition is to be forthwith filed, and is to be considered as taken *de bene esse*.\*

The next rule, relating to this subject, was made on the 13th of May 1814; and declares, "that a rule to take depositions on notice given, shall be confined to taking them within the district, unless otherwise agreed; and if taken by agreement, out of the district, the description of judicial character, before whom it is agreed to be taken, shall be designated in the rule; and all depositions are to be considered as taken *de bene esse*,

April Session, 1805, May 23d.

\* ORDERED—That a rule for a commission to any of the United States, or to foreign parts, shall be, of course, and may be, entered by either party in the Clerk's Office; but the interrogatories must be filed in the Clerk's Office at the time; a copy thereof, and written notice of the rule and of the names of the commissioners, must be served on the adverse party, at least fifteen days before the commission issues, in order that he may file cross interrogatories, or nominate commissioners on his own part, if he shall deem it eligible.



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if the place of caption be within the reach of the process of the Court.\*

The Act of Congress must necessarily be so construed, as to confine its operation to depositions taken *within the district* where the witness lives, *more than one hundred miles* from the place of trial; because, the process to compel the attendance of witnesses, could run to any greater distance *within the district*; and on that account, the deposition is to be *de bene esse*. But a subpoena could not, at that time, run into another district. The Act which declared that such process for witnesses to attend in one district, might run into any other district, provided, that in civil cases, the witnesses do not live more than one hundred miles from the place of holding the Court, did not pass into a law, until the 2d of March 1792.

But this Act, it is conceived, could not affect the construction of that of September 1789, before mentioned; because, otherwise, this absurdity would follow, that a deposition, *taken de bene esse*, might be taken of a witness living in another state, at any distance from the Court, or even beyond seas: because, they would live, within the words of the law, more than one hundred miles from the place of trial. Besides, it would have been something like a legal solecism in the Act of 1789, to declare a deposition taken out of the district, to be *de bene esse*, when the party had no means to compel the attendance of the witness.

The Act of 1789, being confined to depositions of witnesses living within the district, but beyond one hundred miles from

April Session, 1814, May 13th.

\* *Comment.*—That a rule to take depositions in any cause, or notice given, be confined to taking such depositions within the District, unless otherwise specially agreed. And if taken by agreement, out of the District, the description of the judicial character, before such depositions shall be agreed to be taken, shall be designated in such rule. All depositions to be considered as taken *de bene esse*, if the place of caption be within the reach of the process of this Court.

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the place of trial, the rules above noticed, were framed in order to provide for cases not within the law; that is, where the witness lives within the distance of one hundred miles from the place of trial; and whether *within* or *without* the district, or in the words of the rule, "within the reach of the process of the Court."

These depositions may be taken on rules entered during the session of the Court, or in the Clerk's Office, in vacation. But in either case, unless the rule specify that the deposition is to be taken without the district, it is to be confined to witnesses living within it; and such special rule, to extend to witnesses out of the district, must be made by agreement of the parties; and the character of the person taking it must be designated in the rule; and all such depositions are to be *de bene esse*.—This opinion is not to be construed to exclude cases of depositions taken differently from what the law or rules prescribe, under the agreement of the parties, or any special rule of the Court, in any particular case.

Under either rule, reasonable notice of the time and place of taking the depositions, must be served on the adverse party, if living within one hundred miles; otherwise, upon him or his attorney; not only because this is reasonable and consistent with the spirit of the law, but because it is required by the rule of the 23d May 1805.

Where witnesses live out of the district, and more than one hundred miles from the place of trial, their depositions, if taken, must be under a commission, and will, of course, be *absolute*. Although the point now in controversy relates only to depositions taken without commissions, it may not be improper, in this place, to record two other rules of the Court upon the subject, in order that the whole may be brought into one view.

The rule of the 23d May 1805, provides, that "a rule for a commission to any of the United States, or foreign parts, shall be of course, and may be entered, by either party, in the Clerk's Office. But the interrogatories must be filed in the office at

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the time; a copy thereof, and written notice of the rule, and of the names of the commissioners, to be served on the adverse party, fifteen days, at least, before the commission issues, in order that he may file cross interrogatories, and name commissioners on his part, if he pleases."

The rule of the 27th April 1811, declares, "that a copy of the interrogatories, and written notice of the rule to issue a commission, and of the names of the commissioners, may be served either on the adverse party, or his attorney.

3. As soon as the opinion on the last point was delivered, the plaintiff's counsel moved the Court to reject the deposition which had been read in evidence by the defendant's counsel, in the course of the trial, on the ground that this witness resided in Pennsylvania, more than one hundred miles from this city.

*By the Court.* The deposition was read in evidence, without objection; and it is now too late to make an objection to it. To this opinion an exception was taken, by the counsel for the plaintiff.

4. Philip Frederick, who was called by the defendant, to rebut what Joseph Evans, one of the plaintiff's witnesses, who had been examined to rebut the defendant's testimony, relative to an application, deposed by Joseph Evans to have been made to him by Frederick, to purchase a license from the plaintiff; was asked by the plaintiff's counsel, on his cross examination, "if Daniel Stouffer (one of the defendant's witnesses) was subject to fits of mental derangement?"

This was objected to and overruled by the Court, as improper to be asked in this stage of the cause. If allowed, the whole case might be opened to a new examination of the witnesses, to throw forth testimony which might have been obtained on the primary examination of the witnesses. The question, the Court observed, is not warranted by any thing which has fallen from the witnesses since the defendant closed his testimony, a part of which was Daniel Stouffer's deposition.

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Ingersoll, Rawls, and C. J. Ingersoll, for the plaintiff, contended,—

1st. That the plaintiff's rights under his patent, are to the machine called the hopperboy, and also to his improvements on that machine; and that these rights have received the sanction of the Supreme Court, in the case of *Evans vs. Eston*. 3 Wheaton, 517. Consequently, that if the jury should be of opinion that the plaintiff's improvement on the hopperboy has not been used by the defendant, still, the plaintiff is entitled to a verdict, if the jury should be of opinion, that the defendant has used the plaintiff's hopperboy, without his improvement.

2d. That, upon the evidence, it does not appear, that what is called the *Stouffer hopperboy*, was discovered and used before the plaintiff's discovery in 1783; and that, in fact, it is only a humble imitation of the plaintiff's invention, though the same in principle; and although the jury should, upon the evidence, be of opinion, that the *Stouffer hopperboy* was invented, and even in use in one or two mills, still, this would not be such a use as the law intends, not being public, and generally known to be in use, so as to charge the plaintiff with notice of it; and that this was the kind of notoriety which attended this hopperboy, is evident, from the circumstance that it was never heard of by the many witnesses produced by the plaintiff, some of whom had travelled through the state before and since 1783.

3d. That the effect of the Act of the Assembly of Pennsylvania, granting to the plaintiff an exclusive right to his hopperboy, amounted to a grant of the hopperboy then in existence, (should the jury believe, that the *Stouffer hopperboy* was in existence and use prior to the plaintiff's discovery,) the same being then the property of the public; it being competent to the legislature to make such a grant.

4th. That the *Stouffer hopperboy*, if invented and used prior to the plaintiff's discovery, fell into disuse; and if the jury should be of that opinion, then a prior discovery and use of that

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hopperboy, will present no objection to the plaintiff's patent, as an original discoverer.

5th. That though the jury should be of opinion, that the plaintiff is not the original inventor of the hopperboy, still, the defendant would not be entitled to a verdict. The defendant's counsel relied upon the opinion of the Supreme Court in *Evans vs. Eaton*, 3 Wheaton, 519, which states, that there is error in the charge of this Court, in saying, "that the said Oliver Evans was not entitled to recover, for the hopperboy in his declaration."

Binney, Sergeant, and Joseph R. Ingersoll, for the defendant, contended:—

1. That the patent does not grant to the plaintiff, any thing more than the general result of the combined power of the different machines, and the several improved machines, or in other words, his improvements on these several machines; the Supreme Court having decided, that these expressions import substantially the same thing. This construction has received the sanction of the Supreme Court, as appears from the whole course of the reasoning of the Chief Justice, in the case of *Evans vs. Eaton*. This right to the improved hopperboy, is asserted by Mr. Harper, the plaintiff's counsel in that cause; and the claim to the hopperboy itself, is distinctly disavowed by him. A patent to the same person, for an original invention, and also for an improvement on it, would be a legal absurdity, altogether inconsistent with the provisions of the Patent Laws. The petition and affirmation of Oliver Evans, confine his discovery and patent to his improved hopperboy; and he could not obtain a patent broader than his petition and affirmation, filed in the Patent Office.

2. If the rights of the plaintiff be those which his counsel contend for, still, in relation to his claim for a violation of his improved hopperboy, he cannot have a verdict; because the nature of his improvement is not stated in his specification. No evidence has been given to the jury, to prove what these improvements are, nor have the counsel pretended to point them

out. But it is essential to the validity of the patent, that they should appear in the specification, as required by the 3d section of the Patent Law. The Supreme Court, in *Evans vs. Eaton*, page 518, *Wheaton's Rep.* vol. 3, confirms this doctrine.

But, even if the plaintiff had shown in what his improvements consist, he cannot recover against this defendant, since it is in evidence, that he uses only the original Stouffer hopperboy.

3. The plaintiff cannot recover as an original inventor of the Stouffer hopperboy; the evidence proving, incontestably, that the Stouffer hopperboy was discovered, and in use,—in public use,—though this is not required by the law,—in many mills, long prior to the year 1783, the earliest period of the plaintiff's invention contended for even by himself.

4. There is no evidence, that the Stouffer hopperboy ever sunk into disuse; but if that were proved, still it could not be patented by the plaintiff, as he could not swear that he was the first inventor.

*WASHINGTON, Justice*, charged the jury. After stating the evidence on both sides, the facts intended to be proved by the evidence given in this cause, may be arranged under the following heads:—

1. Such as respect the value of the plaintiff's hopperboy.
2. The time of its discovery.
3. The kind of machine used by the defendant.
4. The time of its discovery and use.

*First.* As to the first, the Court has no observations to make, except that if you should find a verdict for the plaintiff, you will give the actual damages which the plaintiff has sustained, by reason of the defendant's use of his invention, which the Court will treble.

*Second.* The evidence applicable to this head, if believed by the jury, proves, that in 1768, Oliver Evans communicated his investigation of the subject of an improvement in the manufacture of flour; and, in the summer of the same year de-

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clared he had accomplished it. In 1784, he made a model of his hopperboy, which had no rods, weights, or pulley; and, consequently, the lower arm was, for the sake of experiment, turned by the hand. In 1785, it was in operation in a mill, in as perfect a state as it now is.

*Third.* If the witness, who has been called to prove the kind of instrument used by the defendant, is believed by the jury— it consists of an upright square shaft, with a cog-wheel that turns it; and which is moved by the water power of the mill. This shaft is inserted into a square mortice in the arm or board, somewhat resembling an S, with strips of wood fixed on its under side, and so arranged, as to turn the meal below it, cool, dry, and conduct it to the bolting chest. This arm slips with ease up and down the shaft, and must be raised by hand, and kept suspended, until the meal is put under it. It has no upper arm, pulley, weight, or leading line; and the strips below the arm, are like the rake, as it is called, in the plaintiff's hopperboy. The machine has acquired the name of the S, or Stouffer hopperboy.

*Fourth.* The witnesses examined, to prove the originality and the use of the defendant's hopperboy, if believed by the jury, date them as early as the year 1765; and its erection and actual use, in many mills, in 1775-78; and progressively to later periods.

Objections have been made, on each side, to the credit of some of the witnesses, who have been examined on the other side; not on the ground of want of veracity, or character, but of interest about of that which can affect their competency. These objections have been pressed so far beyond their just limits, as to require from the Court an explanation of their real value. Where the evidence of witnesses, opposed by other witnesses, is relied upon by either side to prove a particular fact, the jury must necessarily weigh their credit, in order to satisfy their own minds, on which side the truth is most likely to be; and, in making this inquiry, every circumstance which can affect

the veracity of the witnesses, whether it concern their moral character, or arise from some interest which they may have in the question; or from feelings and wishes favourable to one or other of the parties, should be taken into the calculation. But, if the fact in controversy may exist, without a violation of probability, and the proof is by witnesses exclusively on that side; there is nothing to put into the opposite scale, against which to weigh the credit of those witnesses; and, if the objection to their credit be worth any thing, it must be to the full extent of rejecting their testimony altogether, or else it is worth nothing. The jury cannot compromise the matter, or halt between two opinions. They must decide that the fact is so, or is not so; and if the latter, because of objections to the credit of the witnesses, it would amount to a confounding of the questions of competency and credibility; for the effect would be the same, whether the Court refused to permit the witness to testify, on the ground of incompetency, or the jury should reject the testimony when given on that of want of credibility. We have thought it proper to submit these general observations to the consideration of the jury.

We come now to the question of law which arises out of these facts, which is:—

What are the things, in which the plaintiff alleges, and has proved, an exclusive property, which he asserts the defendant has used, and which he denies?

The first claim is for an improved hopperboy, which the plaintiff insists is granted by his patent, which has received the sanction of the Supreme Court, and which the defendant acknowledges. This then being conceded ground, the Court will proceed to examine it; and the inquiry in point of law will be, whether the plaintiff is entitled to a verdict, for an infringement of his patent, for an improved hopperboy?

The objection, stated by the defendant is, that the plaintiff has not set forth, in his specification, what are the improvements, of which he claims to be the inventor; so that a person



skilled in the art, may comprehend distinctly in what they consist.

This objection is, in point of fact, fully supported; neither the specification, nor any other document connected with the patent, states, or even alludes to any specific improvement in the hopperboy. Taking this as true, how stands the law?

The 3d. section of the Patent Law declares, "that before an inventor can receive a patent, he shall deliver a written description of his invention, in such full, clear, and exact terms, as to distinguish the same from all other things before known; and to enable a person skilled in the art, ~~from~~ of which it is a branch, to make and use the same."

What then is the plaintiff's invention, as asserted by the plaintiff, conceded by the defendant, and sanctioned by the Supreme Court, in the case of *Evans vs. Eaton*? The answer is, an improvement on the hopperboy, or an improved hopperboy, which that Court have declared to be substantially the same. If this be so, then the section of the law, before mentioned, has declared, that he must specify this improvement, in full, clear, and exact terms. If he has not done so, he has no valid patent, on which he can recover.

The English decisions correspond with the injunctions of our law. The American decisions, so far as we have any report of them, maintain the same doctrine. Mr. Justice Story, in the case of *Lovel vs. Lewis*, lays it down, that "if the patent be for an improvement in an existing machine, the patentee, must in his specification distinguish the new from the old, and confine his patent to such parts only as are new; for, if both are mixed together, and a patent is taken for the whole, it is void."

What is the reason for all this?

In the first place, it is to enable the public to enjoy the full benefit of the discovery, when the patentee's monopoly is expired, by having it so described upon record, that any person, skilled in the art of which the invention is a branch, may be able to construct it.

The next reason is, to put every citizen upon his guard, that he may not through ignorance violate the law, by infringing the rights of the patentee, and subjecting himself to the consequences of litigation. The inventor of the original machine, if he has obtained a patent for it, and all persons claiming under him, may lawfully enjoy the full benefit of that discovery, notwithstanding the improvement made upon it by a subsequent discoverer. If he has not chosen to ask for a monopoly, but abandons it to the public, then it becomes public property, and any person has a right to use it. The inventor of the improvement may also obtain a patent for his discovery, which cannot legally be invaded by the inventor of the original machine, or by any other person. The rights of each are secured by law, and there is no incompatibility between them.

But if a man, wishing to use the original invention, and honestly disposed to avoid an infringement of the improver's rights, is unable to ascertain from any certain and known standard, where the original invention ends, and where the improvement commences, how is it possible for him to exercise his own acknowledged right, freed from the danger of hurting that of another?—and to what acts of oppression might not this lead? Might not the patentee of his mysterious improvements obtain from the ignorant, the timid, and even the prudent members of society, who wish to use the original discovery, the price he chooses to ask for a license to use his improvement; and in this way compel them to purchase it, rather than incur expenses and inconveniences far greater than the sum demanded would pay for or compensate? If this may happen, then the improver enjoys in a degree the benefit of a discoverer, both of the original machine, and also of the improvement. In short, the patentee of the improvement may, to a certain extent, keep all others at arm's length as to the original invention, or make them pay him for it in derogation of the rights of the inventor of the original machine.

If this be the law applicable to cases in general, is this an

*Evans vs. Hottick.*

excepted case? The plaintiff's counsel have not directly asserted it to be so; but they have referred, with some emphasis, to what is said by the Supreme Court, in the case of *Evans vs. Eaton*, 3 Wheaton's Reports, 549. The expressions are, "in all cases where the plaintiff's claim is for an improvement, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject, may comprehend distinctly in what it consists."

This decision does not state, in what way the extent of the plaintiff's improvement is to be proved, nor did the case require that the Supreme Court should be more explicit. The obvious conclusion is, that the Court left that matter undecided, and meant that the extent of the plaintiff's improvement should be shown, according to the rules of law; a contrary construction would be most unfair, and unwarranted.

Is it possible to suppose, that if the Supreme Court intended to decide contrary to the 3d section of the Patent Law, and to the English and American decisions, that this was a case without the influence of that law, and those decisions, such intention would have been expressed in such guarded terms? This cannot be admitted. Neither can the private Act, for the relief of Oliver Evans, warrant the argument, that this case is freed from the restrictions contained in the 3d section of the Patent Law; because, except as to the extent of the grant it refers to; and the Supreme Court, in the case cited, considering it as within the provisions of that law, is it likely that the Supreme Court could have meant that the plaintiff might cure the defect of his specification, by proving to the jury in what his improvements consisted? If so, then as to the present defendant, such an explanation would be unavailing, to save him from the consequences of an error, against which the sagacious wit of man could not have guarded him. He has sinned already, if he has invaded the plaintiff's right; and it is now too late to convince him of his error, if he must be a victim of it, for the want of that right, which is now shed upon the jet, long after his supposed transgression.

But of what avail would this explanation be, after the expiration of the plaintiff's monopoly? The parol evidence given in a Court of Justice, is evanescent, and affords the most unsafe notice of facts, particularly when they respect matters of art, that can be supposed.

What man, who wishes not to invade the plaintiff's patent, would venture to erect a hopperboy, merely from the information which he could gather from this trial? He could obtain none upon which he could safely rely; nor could any artist, after the expiration of the plaintiff's right, be enabled from such a source, to know how to construct this improvement.

But, even if the extent of the improvement could be traced in this way, the plaintiff has not attempted to prove it; and what is more, his counsel, although repeatedly called on to point it out, have not attempted to do it.

Can the jury, without evidence, and without the aid of the plaintiff or his counsel, say in what these improvements consist? If they had never seen another hopperboy, supposed to be the original, this would be impossible. If having seen the Stouffer hopperboy, they can do so, by comparing with it the plaintiff's improved hopperboy, then the consequence seems to be almost inevitable, that the Stouffer hopperboy is the original one, the point which, under the next head, is denied by the plaintiff. But if the specification had stated in what the plaintiff's improvement consisted, still he is not entitled to a verdict for a violation of that right, unless he has proved, to your satisfaction, that the plaintiff has infringed that right.

• Upon the whole, this patent, so far as it is for an improvement, cannot be supported; and as no claim founded on that right, the plaintiff is not entitled to your verdict.

2d. The plaintiff contends, that he is the original inventor, not only of the improved hopperboy, but of the whole machine; — that his patent grants him the exclusive right to both, and that this claim has received the sanction of the Supreme Court.

Whether, in point of fact, he is the original inventor of the hopperboy, will be attended to hereafter; neither shall we stop

*Evans vs. Hethick.*

to inquire whether the plaintiff's patent grants him the right; because, if the Supreme Court has sanctioned the claim, that is law for this Court.

The part of the decision of that Court, relied upon by the plaintiff's counsel, is to be found in page 517, 3 Wheaton's Reports, where the Chief Justice says,—“The opinion of the Court, then, is, that Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered.”

It would seem almost impossible to misunderstand this positive declaration of the Court. It appears to be the result of the previous reasoning. It states that the plaintiff may claim,—1. The exclusive use of his improvements and inventions in the art of manufacturing flour. 2. In the several machines which he has invented. 3. In his improvements on machines previously discovered. As to the first, there is no dispute in this cause. The third has been already disposed of. The second is now to be examined.

It is contended, by the defendant's counsel, that this is not the correct construction of this sentence in the decision of the Court, because it is inconsistent with the pretensions of the plaintiff's counsel, (see Mr. Harper's argument, 3 Wheaton's Rep. page 499,) and with the course of argument of the Chief Justice, throughout the opinion which led to the foregoing conclusion.

This supposed inconsistency may, in the opinion of this Court, be explained by the following observations:—The exceptions taken to the charge of this Court, in the case of *Evans vs. Eaton*, were—1st. He stating, that the patent of Oliver Evans was only for the combined effect of all the machines mentioned in his patent; and 2d. In directing the jury to find for the defendant, if they should be of opinion, that the hopper-boy was in use prior to the improvement alleged to have been made by Oliver Evans.

But of what avail would this explanation be of the plaintiff's monopoly? The power of a Court of Justice, is evanescent, and a notice of facts, particularly when they are that can be supposed.

What man, who wishes not to be vexed, would venture to erect a hopperboy, which he could gather from none upon which he could safely rely, after the expiration of the plaintiff's patent, to know how to construct the source, to know how to construct the hopperboy was

But, even if the explanation were given in this way, the plaintiff's patent, what is more, his counsel, for an improved hopperboy, it out, have not attained the improvements, and the charge pre-

Can the jury, whilst the Judge aims to prove that plaintiff or his counsel, to this double claim, he does not exist? If they do. There is one expression, relied upon by be the original counsel as having this appearance; but it is Stouffer he that the word relied on is a typographical error, plaintiff? The Court should both deny and affirm the plaintiff's be almost an original inventor of the hopperboy.

And on the Court came to state, definitively, what were the plaintiff's claims, under his patent, the whole are distinctly stated. The Act "for the relief of Oliver Evans," authorizes a grant to him of his improvement in the art of manufacturing flour, and in the several machines which he has invented, and in his improvements, &c.

The Court says, 3 Wheaton's Reports, page 508, that the application "is co-extensive with the Act."

If, then, in this enumeration of the plaintiff's rights under the patent, that to the machines had been omitted, it might have been supposed, that it was not recognised by that Court; and it was consequently introduced in order to prevent a conclusion against its validity, although it had not been brought

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pon the whole, we are of opinion, that the question, who

the original inventor of the hopperboy, is left open by the

Supreme Court, and is now to be decided by this jury.

If, then, the jury should be of opinion, upon the evidence, that the hopperboy which the defendant uses, was invented and in use prior to the discovery of Oliver Evans, then your verdict ought to be for the defendant.

But to this instruction, there are objections which it is proper to notice. It is contended, that the judgment of the Supreme Court, in *Evans v. Eaton*, 3 Wheaton, page 119, where it is said that there is error in the proceedings below, in that, in the charge the opinion is expressed that Oliver Evans is not entitled to recover, if the hopperboy in his declaration mentioned, had been in use previous to his alleged discovery; entitles the plaintiff to a verdict; although the jury should be of opinion, that he is not the original inventor of the hopperboy.

That the Court did not mean this, is most obvious, from what is said in page 517, that "Oliver Evans may claim the exclusive use of the several machines, which he has invented;" could the Supreme Court intend to say, immediately after, that

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 Evans vs. Hestick.
 

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he is entitled to a verdict for a machine which he has not invented? Can it be supposed, that the Court meant to ride over the third section of the Patent Law, and set up a different rule to govern this case, without having stated the reasons for so extraordinary a distinction? This is altogether inadmissible.

Another reason may be urged against the conclusion drawn by the plaintiff's counsel, from the judgment, which is this:—The error to be corrected by that part of the judgment relied on, that "the Court instructed the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use prior to the invention of Oliver Evans's improvement." Now, the words "*in the declaration mentioned*," are not in the charge of the Circuit Court, as stated by the Chief Justice, which the Supreme Court proposes to condemn; and it is the insertion of these words into the judgment, which produces all the difficulty. Leave them out, and then the judgment is consistent with the whole reasoning of the Chief Justice, which condemned the charge of the Circuit Court; because it precluded Oliver Evans from obtaining a verdict for his *improvement*, if he was not the inventor of the elementary parts of the machine. Retain them, and it follows, that if Oliver Evans was proved not to be the inventor of the hopperboy, in his *declaration mentioned*, still, the defendant was not entitled to a verdict. This would be in such direct opposition to the 6th section of the Patent Law, that we cannot suppose this was the meaning of the Supreme Court.

2. The next objection to this instruction is, that the Act of the legislature of Pennsylvania, conveyed to Oliver Evans the original hopperboy; and consequently, its existence and use, at a period prior to the plaintiff's discovery, cannot now be urged to invalidate his patent.

There are two conclusive answers to this argument—1. That it is by no means to be admitted, that the Act operates to make such a transfer;—but 2. If it did, still, the plaintiff



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*Evans vs. Hettick.*

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cannot recover, if he appears not to be the first, or original inventor of the hopperboy. This claim in this action is not derived either from the state, or from an individual. His suit is founded on his patent, and unless he was himself the original inventor of the hopperboy, he cannot recover.

3. Another objection stated by the plaintiff's counsel, is, that the Stouffer hopperboy, although the jury should believe that it was in use, in many mills, before the plaintiff's discovery, had fallen into disuse; and, therefore, it cannot be used to invalidate the plaintiff's right to recover.

The answer to this is, that whether it fell into disuse, or not, if it was used before the plaintiff's discovery, the plaintiff could not obtain a patent for it, so as to exclude the defendant from using it, if he chose to do so.

4. The last objection is, that the use of the Stouffer machine, cannot affect the plaintiff's patent, unless it was public, so as to affect the plaintiff, or other inventors, with notice. Whether that hopperboy was in public use, or not, the jury will judge, from the testimony of the witnesses. It was erected, and used in four or five mills; if the witnesses are believed, who have testified for the defendant, on that point. But this argument has no foundation in the Act of Congress, which does not speak of public use, of the nature represented by the counsel. It is immaterial, whether the patentee had notice of the prior invention, or not. If it was in use, in any part of the world, however unlikely or impossible that the fact should come to the knowledge of the patentee, his patent for the same machine cannot be supported.

*Verdict for the defendant.*

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Prevost vs. Gratz.

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## PREVOST vs. GRATZ.

In equity.—If the bill alleges a particular fact, the plaintiff cannot, in argument, urge that the fact is otherwise. He is bound by his admission; unless, before the hearing, he obtains leave to amend.

Under the equity of the Act of Assembly of Pennsylvania, which allows commissions to executors, trustees are entitled to claim them. *Quere*, if trustees are so entitled, by the general rules of Courts of Chancery.

*WASHINGTON, Justice*, delivered the opinion of the Court. This case comes before the Court, upon exceptions to the Auditor's Report, made in pursuance of the decrees of the 14th of October, and the 12th of November, 1816.

The first exception is taken by the complainant, to so much of the report, as debits him with the sum of £484, and interest from the 30th of April 1775; being the purchase money for 10,000 acres of land on Raccoon creek, improperly credited to George Croghan, as it is alleged by the defendants, in the account settled between the said Croghan, and Barnard and Michael Gratz, on the said 30th of April 1775.

The defendants endeavour to maintain the correctness of this debit, upon the ground, that the deed made by George Croghan to Barnard Gratz, of the above tract of land, bearing date the 10th of July 1772, though absolute in form, was, in its origin, intended to be in trust for the said Barnard Gratz, to sell the same for the benefit of the creditors of the grantor; or, if not so, that it was converted into a trust, either by a subsequent agreement between the parties to it, or by the tacit acquiescence of Major Prevost, the husband of the only daughter, and residuary devisee of George Croghan; and also of the complainant, in the declarations of that fact, stated in the list of George Croghan's papers, taken by Marache and two others,

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Prevost vs. Gratz.

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on the 25th of September 1782, in which this deed is styled a deed in trust; and, in the subsequent deed of Barnard Gratz, containing a more solemn declaration of the trust, bearing date the 12th of November 1800.

After the most mature examination of this subject, we are compelled to pronounce our dissent from these positions; but, as we shall decide the point, upon entirely different grounds, it will be unnecessary to be more particular in stating our reasons for this opinion.

The bill contains an acknowledgment of the fact, that this deed, though absolute in form, was in reality intended to be a deed in trust; which the answer admits. The allegations of the bill are, that George Croghan made to Barnard and Michael Gratz, or to one of them, various absolute deeds of his lands lying in Pennsylvania and New-York, to enable him to sell the same for the use of his creditors, or of himself; and amongst other exhibits, made parts of the bill, a reference is made to a declaration of trust, dated the 2d of June 1775, made by George Croghan and Barnard Gratz, in relation to two other tracts of land, and also to the before-mentioned declaration of trust, of the 12th of November 1800, relative to the tract in controversy; "in which," the bill states, "the trust aforesaid is in part acknowledged." It also refers to the list of papers taken on the 25th of September 1782, as an exhibit to show which were the title papers of George Croghan, which came to the possession of Barnard and Michael Gratz; and the fifth interrogatory asks, if George Croghan did not make conveyances of lands to Barnard and Michael Gratz, which were absolute upon their faces; *but which were in fact, trusts as before mentioned?*

Now let the fact of the trust be how it may,—the plaintiff having in his bill alleged, that this was in reality a deed in trust, it is not competent to him, to deny it in argument, or to disprove it by evidence; because, by such a mode of proceeding, he would deprive the defendant of the opportunity, by his

answer and proofs, to show that the deed was, in reality, such as the bill admits it to be. The allegations and proofs must agree;—neither the plaintiff, nor defendant, can allege one thing, and prove the contrary. If an allegation has been made by mistake, it can only be rectified before the hearing, by a motion to amend.

This being the situation of the complainants' case, in reference to this point, the next question is, are the defendants entitled to claim the amount of the consideration, stated to have been paid for this land, as a credit against the sum for which they are liable, under the decree?

The decree in substance is, that the representatives of Michael Gratz, shall account for and pay to the complainant, the profit made by their intestate, by the sale of the tract of land called Tenedera, or Unadilla, over and above the sum for which George Croghan was credited, in the account of the 30th of March 1775, with interest, &c.; making all just allowances for commissions due to Michael Gratz, or for advances made by him or by the defendants, on account of the estate of George Croghan; and allowing generally, all just credits to which the defendants were entitled.

The purchase money for this land, was credited by George Croghan, in that account, as so much paid to him by Barnard and Michael Gratz; and it must therefore be considered as advanced by Barnard and Michael Gratz, for Barnard Gratz, which, it is to be presumed, he has accounted for; and if not, his estate is answerable for the amount. If, therefore, the estate of George Croghan be bound to repay that sum to any person, it can only be to the legal representatives of Barnard Gratz. But they are no parties to this suit;—they can receive neither benefit nor injury, by any decree which the Court can now make. We must, therefore, allow this exception.

The next exception taken by the complainant to the report, is to the refusal of the Auditor to allow to the complainant a credit for 198*l.* 2*s.*, received by Barnard Gratz, on account,

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Brevost vs. Gratz.

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as it is alleged, of George Croghan; and because he has allowed the defendants a credit for the balance due by George Croghan, to Barnard and Michael Gratz, according to the account of the 9th of November 1781, without deducting the amount so received by the said Barnard Gratz.

There is certainly some obscurity in relation to the transaction to which this exception applies; but as the circumstances relied upon by the complainant, to show that the note of R. L. Hooper was placed in the hands of Barnard Gratz by George Croghan, to enable him to collect the same for his use, are very slight and unsatisfactory; and the endorsement of the note in blank, is *prima facie* evidence of a transfer of it to Barnard Gratz, for value received at the time; or possibly, it might have been in satisfaction of money due from George Croghan to Barnard Gratz;—we cannot consent, after a lapse of so many years, to allow this sum to be offset against the balance of account, due by George Croghan to Barnard and Michael Gratz; particularly, as there is not the slightest evidence, to prove that this was a partnership transaction, or that Michael Gratz had any thing to do with it. This exception, therefore, is to be overruled.

The complainant's third exception is to the allowance of too large a credit to the defendants, for agency, commissions, &c., in relation to the land, for the sale of which the defendants were required by the decree to account.

Without intending to meddle with the question, whether a trustee is entitled to commissions upon the general principles which prevail in Courts of Equity, we think he is so in this state, under the equity of the Act of Assembly; which allows them to executors, &c.; and such, we understand, has been the practice. Indeed, this point appears to be decided by the decree, which directs all just allowances to be made for commissions due to, and advances made by, Michael Gratz, on account of the estate of George Croghan.

It must be acknowledged, that the rate which the commis-

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*Prevost vs. Gratz.*

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sions allowed by the Auditor, bears to the sum for which the land was sold, appears to be considerable. But, as we have not the evidence before us of which the Auditor had the benefit, and must therefore either confirm his report in relation to this subject, or set it aside altogether, and refer it again to him, we shall embrace the former branch of the alternative, and overrule this exception.

The above reasons apply with increased weight to the complainant's fourth exception, to the allowance made by the Auditor to the defendants, for certain advances made by Barnard and Michael Gratz; which exception is of course disallowed.

The defendants' first exception, is to the manner in which the Auditor has charged the interest on the two sums of £ 484 and £ 747 12s. 6d.; the former being the consideration for the 10,000 acres of land, on Raccoon creek; and the other for the Unadilla land. The £ 484 being discarded from the account altogether, by the opinion before given upon the complainant's first exception, there can, of course, exist no question as to the interest on that sum. As to interest on the other sum; the Court approves of the mode adopted by the Auditor, of charging interest upon the principal sum, from August 1774, to the 5th of March 1795, so as to avoid the giving to the defendants the benefit of compound interest, as claimed by them. This manner of stating the account is in strict conformity with the intention, as well as with the letter, of the decree, which directs, that the defendant shall account for the profit made by Michael Gratz, by the sale of this tract of land, *over and above* the sum for which George Croghan was credited, in the account settled on the 30th March 1775. All that was to be done, then, was, to take this sum from that account, and to credit it, with legal interest, in the account directed by the decree, without further attention to the subsequent accounts, which the parties had settled.

The second exception taken by the defendants, is to the disallowance of a credit of £ 180 specie, in April 1779, with inter-

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Prevost vs. Gratz.

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est from that time, as claimed by the defendants, being the amount credited by Barnard and Michael Gratz to George Croghan, in the account settled on the \_\_\_\_\_ as the consideration of 18,580 acres of land, conveyed by George Croghan to Michael Gratz, with a general warranty.

The ground of this exception, is an alleged defect in the title of George Croghan to this land, which appears to be in the possession of adverse claimants; and for the recovery of which, ejectments have been brought, and are now depending.

As this alleged defect of title is altogether without proof, and it does not appear that Michael Gratz, or those claiming under him, have been evicted by *title paramount*; this Court, sitting as a Court of Equity, can afford the defendants no relief, either by decreeing a repayment of the purchase money, or by withholding from the complainant a sum equivalent thereto, until the title at law has been decided. It is a question purely of common law jurisdiction; and to that tribunal we must refer the defendants, should the covenant of warranty be violated.— This exception, therefore, cannot be sustained.

The third exception of the defendants, being embraced in one of the complainant's exceptions, and already decided, is of course overruled.

THE UNITED STATES vs. WILLIAM WOOD.

Indictment for aiding and assisting in the robbery of the mail; putting the life of the carrier in jeopardy, by means of dangerous weapons; and for robbing the mail.

What a witness (since dead) swore at the former trial of this indictment, may be proved by a person who was present, and heard his testimony; provided he can repeat the testimony as the witness gave it, and not merely what he conceives to, be the substance of it. He may refresh his memory from notes, taken at the time; or from a newspaper, printed by him, containing the evidence as taken down by himself.

The 28th section of the Act of Congress, for punishing certain crimes, passed April 30, 1790, which requires a list of the witnesses to be delivered to the prisoner, three days before the trial, is confined to treason; nothing more being required, in any other capital offences, than the delivery of a copy of the indictment and a list of the jurors.

Upon an indictment for robbing the mail, and putting the life of the mail-carrier in jeopardy; a sword or pistol, in the hand of the robber, by terror of which the robbery is effected, is a dangerous weapon, within the law; although the sword be not drawn, and the pistol be not pointed. It is not necessary to prove, that the pistol was charged; it is presumed to be so, until the contrary is proved.

THE prisoner was indicted again, for aiding and assisting in the robbery of the mail, putting the life of the carrier in jeopardy, by the means of dangerous weapons. 2d. For simply robbing the mail. The evidence was nearly the same with that given upon the former indictment, except that Joseph Hare, who was examined as a witness, in behalf of the prosecution, had since died.

Mr. Bache was offered as a witness, to prove what Hare swore at the former trial. This was objected to.

*By the Court.* The evidence is admissible, provided the witness can repeat the testimony which Hare gave, and not merely



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The United States vs. Wood.

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what he conceives to be the substance and effect of it, of which the jury ought alone to judge. He may refresh his memory from notes, which he took of the evidence at the trial, or from a newspaper, printed by himself, containing the evidence of Hare, as taken down by the witness; but he must be sure of the accuracy of the statement, from his own recollection, and not merely from a confidence in the accuracy of the statement to which he refers.

The witness acknowledged, that he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them down as the witness uttered them, and that they are truly copied into the paper published under his own inspection.

The Court refused to suffer him to be examined.

Another objection was made to the examination of this witness—that the prisoner had not received a list of the witnesses, in which the name of this one was mentioned, as required by the 28th section of the Act for punishing certain crimes, &c., 2 vol. Laws U. S. N. E. 98.

*By the Court.* The part of that section which requires a list of the witnesses to be delivered to the prisoner, three days at least before the trial, is expressly confined to cases of treason; the same section, immediately afterwards, requiring nothing more than a copy of the indictment, and list of the jurors, to be delivered in other capital offences.

The charge delivered by *Washington, Justice*, was in substance the same as on the former trial; except, that he stated, as the opinion of the Court, the following principles, in relation to the construction of the 19th section of the Post Office Law, 4 Laws U. S. N. E. 297. 1. That a sword or a dirk, in the hands of the robber, by means and under terror of which the carrier is robbed of the mail, is a dangerous weapon within the meaning of the Act, although not drawn or pointed at the breast of the driver at the time.

2. A pistol in the hands of the robber, by means and terror of which the carrier is robbed of the mail, is a dangerous weapon; and it is not necessary to prove that it was charged;—the presumption is, that it was so, until the contrary is proved. But in this case, this presumption assumes the form of positive proof, the demand of the mail having been accompanied by a threat to blow out the brains of the carrier, if he refused to deliver it; which could not have been effected, unless the pistols were charged, and in all respects prepared to endanger life.

The jury found the prisoner guilty upon the third count, as accessory to a simple robbery of the mail.

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EVANS vs. EATON.

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## EVANS vs. EATON.

Where the record of a judgment in the Circuit Court, has been sent to the Supreme Court, and an appearance entered there, by the defendant in error; and a decision by the Supreme Court, reversing the judgment, and remanding the cause for a new trial; the defendant in error cannot object, that the judgment, in this cause, is in force, and unreversed, upon the ground, that no writ of error had been sued out.

A witness, who uses a machine resembling that of the plaintiff, is not an incompetent witness for the defendant; because the patent of the plaintiff may be defective, as the Court cannot, in the case in which he is offered as a witness, declare the patent void, so as to benefit the witness; although in the case a verdict should be given for the defendant, on the ground that the plaintiff was not the original inventor of the machine.

If two machines be substantially the same, and operate in the same manner, to produce the same result, though they differ in form, proportions, and utility, they are the same in principle; and the one last discovered, can have no other merit, than to be an improvement of the other; but for which the inventor can obtain no patent. If the improvement be in the principle, a patent may be obtained for the improvement.

To the validity of a patent for an improvement, it is necessary to state, in the specification, in what the improvement consists.

**T**HIS cause came on to be re-tried, under the mandate of the Supreme Court of the United States, to award a *ven. fac. de novo*. See 3 Wheaton.

When the cause was called for trial, the defendant objected, that the judgment of this Court, upon the former trial, was still in force, and unreversed; as no writ of error had been sued out, to remove the record of that judgment into the Supreme Court; without which, that Court would not take jurisdiction of the cause.

*By the Court.* After an appearance of the defendant in error in the Supreme Court, and pleading, as it must be pre-

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Evans vs. Eaton.

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súmed he did, to entitle him to appear by counsel, and argue the cause, it is too late to take this objection. We must presume, that all formal objections, and particularly one to the want of the writ, were waived by consent of parties.

The jury being sworn, the competency of Philip Frederick, to give evidence for the defendant, was objected to by the plaintiff, on the ground that he uses a Stouffer hopperboy; and that if the defendant should obtain a verdict, upon the ground of the use of the Stouffer hopperboy by others, prior to the plaintiff's discovery, the Court must declare the patent void; and thus incapacitate the plaintiff to recover against the witness.

*By the Court.* This patent, according to the plaintiff's claim, covers eleven distinct things; and may be perfectly good for a part, though not so as to this particular machine. If, therefore, the jury should find for the defendant, on the ground that the hopperboy was known, and in use, prior to the plaintiff's discovery, the Court could not declare the *whole* patent void, on account of the unsoundness of a part of it, in relation to a distinct machine; and we can find no authority for the judgment which has been hinted at—that is, to avoid the patent, *quoad* the hopperboy.

It is only in this most extraordinary case, of one patent for a great number of different inventions, that this difficulty could occur. But we must say, that, on that account, it must be exempt from that provision of the 6th section, as to the judgment, where the objection goes only to the prior use of one of the patented machines.

The deposition of Michael Former was offered, and objected to, for the reasons urged against it in the case of *Evans vs. Hettick*, (*ante*, page 408.)

The plaintiff's counsel examined the Clerk of the Court, to prove what the practice had been; who states, that rules to take depositions generally, have frequently been entered in the office; and depositions of witnesses living within the state, and

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above one hundred miles from Philadelphia, have been taken; that it has been rare, for twenty years past, to take depositions, under the Act of Congress.

The Court rejected the evidence, for the reason assigned in Hettiok's case.

The counsel for the plaintiff contended, that, under his patent, he was entitled to claim, 1. The entire hopperboy, which is protected by the judgment of the Supreme Court, in this very case, 3 Wheaton, 519; although it should appear that he was not the original inventor of it, which, however, they contended he was; and that the defendant's witnesses, who had testified as to the prior use of the Stouffer hopperboy, must be mistaken in their recollection of dates.

2. An improvement on a hopperboy.—That it is not necessary to the validity of such a patent, to describe in the specification, in what the improvement consists, the 3d section of the law being, in this respect, merely directory to the Secretary of State, authorizing him to refuse a patent, if such a specification be not filed. But, however this may be in common cases, they insisted, that the Supreme Court having decided that one of the plaintiff's claims, under his patent, is to an improvement on the hopperboy, 3 Wheaton, 517, the requisition, p. 518, that he should show the extent of his improvement, must necessarily mean, that he should show it by parol evidence; since the Chief Justice having noticed, in the opinion, p. 515, that the specification does not distinguish the improvement from the original machine, the Court would never have sent the cause to another trial, upon the plaintiff's claim to an improvement, if the specification was deemed too defective to authorize his recovery.

*WASHINGTON, Justice*, charged the jury. This is an action for an infringement of the plaintiff's patent, which the plaintiff alleges to be,—

1. For the whole of the machine employed in the manufacture of flour, called the hopperboy.

2. For an improvement on the hopperboy.

The question is, is the plaintiff entitled to recover upon either of these claims? The question is stated thus singly, because the defendant admits, that he uses the very hopperboy for which the patent is in part granted, and justifies himself by insisting,—

1. That the plaintiff was not the original inventor of the hopperboy, as patented, but that the same was in use prior to the plaintiff's patent.

2. That his patent for an improvement is bad; because the nature and extent of the improvement are not stated in his specification; and if they had been, still the patent comprehends the whole machine, and is, therefore, too broad.

1. The first is a mixed question of fact and law. In order to enable you to decide the first, it will be well to attend to the description which the plaintiff has given of this machine, in his specification, of which a model is now before you. Its parts are—

1. An upright round shaft, to revolve on a pivot in the floor.

2. A leader or upper arm.

3. An arm set with small inclining boards, called flights and sweepers.

4. Cords from the leader to the arm, to turn it.

5. A weight passing over a pulley, to keep the arm light on the meal.

6. A cog at the top of the shaft, to turn it, which is operated upon by the water power of the mill.

The flights are so arranged, as to track, the one between the other, and to operate like ploughs; and at every revolution of the machine, to give the meal two turns towards the centre. The sweepers are to receive the meal from the elevator, and to trail it round the circle, for the flights to gather it to the centre, and also to sweep the meal into the bolt.

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The use of this machine is stated to be, to spread any granulated substance over a floor;—to stir and expose it to the air, to dry and cool it, and to gather it to the bolt.

The next inquiry under this head is, when was ~~this~~ discovery made? Joseph Evans has sworn, that in 1783 the plaintiff informed him he was engaged in contriving an improvement in the manufactory of flour, and had completed it in his mind some time in July of that year. In 1784, he constructed a rough model of the hopperboy; but having no cords from the extremities of the leader to those of the arm, it was necessary, in making his experiments, to turn around the arm by hand. In 1785, he set up a hopperboy in his mill, resembling the model in Court, and the machine described in his specification.

The evidence of Mr. Anderson strongly supports this witness; and indeed, the discovery, as early as 1784, or 1785, is scarcely controverted by the defendant.

The defendant insists, that a hopperboy, similar to the plaintiff's, was discovered and in use many years anterior even to the year 1783, and relies upon the testimony of the following witnesses—

Daniel Stouffer, who deposes that he first saw the Stouffer hopperboy in his father's, Christian Stouffer's, mill, in the year 1774. In 1775 or 1776, he erected a similar one in the mill of his brother Henry, and another in Jacob Stouffer's mill in 1778 or 1779.

Philip Frederick swears, that in the year 1778, he saw a Stouffer hopperboy in operation in Christian Stouffer's mill, and in the year 1783 he saw one in Jacob Stouffer's mill and another in U. Charles's mill; and that it was always called Stouffer's machine.

George Roup states, that in 1784, he erected one of these hopperboys in the mill of one Branneman, and that in 1782, Abraham Stouffer described to him a similar machine which his father used in his mill.

Christopher Stouffer, the son of Christian, has sworn, that

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1. For the whole of the machine employed for the purpose of flour, called the hopperboy.

2. For an improvement on the hopperboy.

The question is, is the plaintiff entitled to these claims? The question is, whether the defendant admits, that he is the inventor of the patent is in part granted, and is not inconsistent with the plaintiff's claim.

1. That the plaintiff was not the inventor of the hopperboy, as patented, but that the plaintiff's patent is not valid.

2. That his patent for the hopperboy is not valid, on account of the nature and extent of the improvement, and if the plaintiff's patent is not valid, the whole machine, as patented, is not valid.

1. The first is, that the plaintiff's machine with the plaintiff's improvements, is not the same as the machine with the plaintiff's improvements, as described in the plaintiff's patent. They each have a hopper, and are driven by the power of the mill, and are supported by the under side of it. They each operate in the same manner, to cool, dry, and conduct it to the mill.

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2. How do they differ? The plaintiff's shaft is round, and

3. The defendant could not turn the arm, into which it is loosely inserted, if it were not for the cords, which connect the extremities of the arm to that of the leader. The shaft of the S hopperboy is square, and therefore turns the arm without the aid of a leader or of cords. It has neither a weight nor pulley, nor are the flights arranged in the manner the plaintiff's are; and consequently, it does not, in the opinion of most of the witnesses, cool, or prepare the flour for packing, as well as the plaintiff's.

The question of law now arises, which is,—are the two machines, up to the point where the difference commences, the same in principle, so as to invalidate the plaintiff's claim to the hopperboy, as the original inventor of it?



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to be, and so it has been settled in this and the two machines be substantially the same manner, to produce the same in form, proportions, and utility, and the one last discovered, has an improved imitation of the one which no valid patent might be considered as the alleged inventor or, previously patented, is not in principle, is not an improvement; (which he cannot be, by law;) he certainly cannot, in a like manner, be the inventor of the machine itself.

For the jury, then, is, are the two hopperboys the same in principle?—not, whether the plaintiff's is preferable to the other? Because if that superiority amounts to an *improvement*, he is entitled to a patent only for an improvement, and not for the whole machine. In the latter case, the patent would be too broad; and therefore void, where the patent is single.

If you are of opinion, that the plaintiff is not the original inventor of the hopperboy, he cannot obtain a verdict on that claim, unless his is an excepted case. The 1st, 3d, and 6th sections of the general Patent Law, conclusively support this opinion.

But the judgment of the Supreme Court in this case, 3 Wheaton, 519, is relied upon by the plaintiff's counsel, to prove, that this is an excepted case; insomuch, that the plaintiff is entitled to a verdict, although you should be satisfied that he is not the original inventor of the hopperboy. That declares, "on consideration whereof, this Court is of opinion, that there is error in the proceedings of the said Circuit Court, in this, that the said Court rejected testimony which ought to have been admitted; and also in this, that in the charge delivered to

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the jury, the opinion is expressed, that the patent on which this suit is instituted, conveyed to Oliver Evans only an exclusive right in his improvement in manufacturing flour and meal, produced by the general combination of all his machinery; and not to his improvement in the several machines applied to that purpose; and also, that the said Oliver Evans was not entitled to recover, if the hopperboy in his declaration mentioned, had been in use previous to his discovery."

But we are perfectly satisfied, that the interpretation put upon this clause, by the plaintiff's counsel, is incorrect; and this for the following reasons. 1. The question of priority of invention, was not before the Supreme Court; and it is therefore incredible, that any opinion, much less a judgment, would have been given upon that point. The error in the charge, which this part of the judgment was obviously intended to correct, is stated by the Chief Justice in the following words:—

"This part of the charge seems to be founded on the opinion, that if the patent is to be considered as a grant of the exclusive use of distinct improvements, it is a grant of the hopperboy itself, and not for an improvement on the hopperboy."

2. It contradicts what is stated in p. 517, where it is said, that the plaintiff's claim is to the machines *which he has invented*. Now, if he did not invent the hopperboy, he has no claim to it; and if so, could the Court mean to say, that he was nevertheless entitled to recover under that claim?

Such a decision was certainly not called for, by the terms of "the Act for the relief of Oliver Evans," but would seem to be in direct violation of it. The Act directs a patent to issue to Oliver Evans, not for his *hopperboy, elevator, &c.*, but "for his invention, discovery, and improvements in the art, &c., and on the several machines which *he has discovered, invented, and improved*." Now, if the hopperboy was not *invented*, &c., by Oliver Evans, this Act, (without which Oliver Evans could not have obtained a patent,) did not authorize the Secretary of State to grant him one for that machine; or if granted, it is

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clear, that it was improvidently done. If, indeed, the Supreme Court had been of opinion, that *the fact* of Oliver Evans's prior invention was decided, and could constitutionally have been decided by Congress, there might have been more difficulty in the case; but the argument of counsel, which pressed that point upon the Court, was distinctly repudiated.

We conceive, that the meaning of that part of the opinion is, that this Court erred in stating to the jury, that Oliver Evans was not entitled to recover, if *the hopperboy*, that is, the original hopperboy, had been in use prior to the plaintiff's alleged discovery of it; because, if the plaintiff was entitled to claim an *improvement* on the hopperboy, which this Court had denied, and which the Supreme Court affirmed, this Court was clearly wrong in saying to the jury, that the plaintiff could not recover for his improvement; which, in effect, was said.

Upon the whole, then, the Court is of opinion, that Oliver Evans is not entitled to a verdict in his favour, as the inventor of the hopperboy, if you should be of opinion, that another hopperboy, substantially the same as his in principle, as before explained, up to the point where any alteration or improvement exists in his hopperboy, was invented, and in use prior to the plaintiff's invention and discovery, however they may differ in mere form, proportions, and utility.

2d. The plaintiff's next claim is, to an improvement on a hopperboy; which claim, we were of opinion, in another case, has received the sanction of the Supreme Court. His counsel contend, that his improvement is—1. On the original method of supplying the bolt by manual labour. 2. On his own hopperboy;—and 3. On some hopperboy invented by some other person.

Let this position be analyzed:—

1. It is said to be an improvement on the original method by manual labour.—But it is obvious, that if this be the invention, it is of an original machine; because, wherever the Patent Law speaks of an improvement, it is on some *art, machine, or*

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the jury, the opinion is expressed, that the suit is instituted, conveyed to Oliver Eaton, right in his improvement in manufactory produced by the general combination not to his improvement in the sey purpose; and also, that the said to recover, if the hopperboy been in use previous to his

But we are perfectly upon this clause, by this for the following invention, was not fore incredible, th have been give

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"This than the one which is alleged to have been that if covered and in use. If, then, you are satisfied of sive r the point of law, which has been raised by the defend-boy counsel, remains to be considered; which is, that the plain-ly's patent for an improvement is void, because the nature and tent of his improvement are not stated in his specification.

The patent is for an improved hopperboy, as described in the specification which is referred to and made part of the patent. Now, does the specification express in what his improvement consists? It states all and each of the parts of the entire machine—its use, and mode of operating; and claims, as his invention, the machine,—the peculiar properties or principles of it, viz. the spreading, turning, and gathering the meal; and the raising and lowering of its arm, by its motion, to accommodate itself to the meal under it.—But does this description designate the improvement, or in what it consists? where shall we find the original hopperboy described, either as to its construction, operation, or use; or by reference to any thing by which a knowledge of it may be obtained?—where are the improvements on

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such original stated? The undoubted truth is, that the specification communicates no information whatever, upon any of these points.

This being so, the law, as to ordinary cases, is clear, that the plaintiff cannot recover for an improvement. The 1st section of the general Patent Law speaks of an improvement as an invention; and directs the patent to issue for his said invention. The 3d section requires the applicant to swear, or affirm, that he believes himself to be the true inventor of the art, machine, or improvement, for which he asks a patent; and further, that he shall deliver a written description of his invention, in such full, clear, and exact terms, that any person, acquainted with the art, may know how to construct and use the same, &c.

That it is necessary to the validity of a patent, that the specification should describe in what the improvement consists, is decided by Mr. Justice Story, in the cases referred to in the appendix to 3 Wheaton, and in the English cases of *Boulton vs. Bull*, *Boville vs. Moor*, *M'Farlane vs. Price*, *Harmar vs. Playne*, and perhaps some others.

What are the reasons, upon which this doctrine is founded? They are to guard the public against unintentional infringements of the patent, during its continuance, and to enable an artist to make the improvement, by a reference to some known and certain authority, to be found amongst the records in the office of the Secretary of State, after the patent has run out.

But it is contended, by the plaintiff's counsel, that the law would be unreasonable, to require, and, therefore, that it does not require, this to be done, unless the improvement is upon a patented machine, a description of which can be obtained by a reference to the records of the office of the Secretary of State;—that it might often be impossible for the patentee to discover, and consequently to describe, the parts of a machine, in use, perhaps, only in some obscure part of the world. The answer to this is, that an improvement necessarily implies an original; and unless the patentee is acquainted with the original, which

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he supposes he has improved, he must talk idly, when he calls his invention an improvement. If he knows nothing of an original, then his invention is an original, or nothing; and the subsequent appearance of an original, to defeat his patent, is one of the risks which every patentee is exposed to under our law.

As to the supposed distinction between an improvement on a machine patented, and one not so, there is nothing in it. In both cases, the improvement must be described; but with this difference—that, in the former case, it may be sufficient to refer to the patent, and specification, for a description of the original machine; and then to state in what the improvements on such original machine consists;—whereas, in the latter case, it would be necessary to describe the original machine, and also the improvement. The reason for this distinction is too obvious to require explanation.

If the general law upon this subject, has been correctly stated, the next question is, is this an excepted case? It is contended by the plaintiff to be so; 1st, in virtue of the Act for the relief of Oliver Evans; and, 2d, by the decision of the Supreme Court.

1. Under the private Act; that declares, that the patent is to be granted, in the *manner and form* prescribed by the general Patent Law. What constitutes the manner and form, in which a patent is granted by this law? The obvious answer is, the petition, the patent, with the signature of the President, and the seal of the United States affixed to it—the oath, or affirmation—the specification, or description of the invention, as required by the 3d section—the drawings and model, if required. Will it be contended, that a patent would be granted, in the *manner and form* prescribed by this law, if there were no description whatever of the invention? And if it would not, which is taken for granted, where is the difference between the total absence of a specification, and one which has no reference at all to the invention for which the patent is granted? This

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is not the case of an imperfect, or obscure description, but of one which relates exclusively to the whole machine; whereas the invention, for which the patent is granted, is for an improvement only.

2. The opinion of the Supreme Court, which states, "that it will be incumbent on the plaintiff, where he claims for an improvement, to show the extent of his improvement." But how is it to be shown? The Court has not pointed out the manner; and we therefore think, the only fair implication is, that it must be shown as the statute of the United States, and the general principles of law require,—by the patent and specification. If it may be shown by parol evidence to the jury, as the plaintiff's counsel contend it may, then it may be fairly asked, *cul bono?* What sort of a showing would this be, so far as it could be productive of any useful purpose? As to this defendant, the evidence comes too late, to save him from the consequences of an error, however innocently committed. As to the public at large, with a view to caution during the continuance of the patent, and to information of the nature of the improvement, after its termination, the evidence given in this cause, must be evanescent, and totally useless.

We feel perfectly convinced, that the meaning of the Supreme Court, as to this subject, is again misunderstood by the plaintiff's counsel; not only for the reasons above mentioned, but because the *extent and construction* of the plaintiff's patent, and not the *validity* of it, in relation to any one of the machines, were the questions before that Court; and none others, (in reference to the charge,) were argued at the bar, or reasoned upon, by the Chief Justice, in delivering the opinion.

Upon the whole, we are of opinion, that the plaintiff is not entitled to a verdict, for the alleged infringement of his patent, for an improvement on the hopperboy.

*Verdict for defendant.*

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Ex parte Graham.

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EX PARTE PETER GRAHAM.

*Habeas corpus.* The petitioner was arrested by the marshal of the District of Pennsylvania, under an attachment from the Circuit Court of Rhode Island, for a contempt; in not appearing in that Court, after a monition served upon him in the state of Pennsylvania, to answer in a prize cause, as to a certain bale of goods condemned to the captors, and which had come into the possession of Peter Graham, the relator.

The Circuit and District Courts of the United States, cannot, either in suit at Common Law or Equity, send their process into another district; except where specially authorized so to do, by some Act of Congress.

The same restrictions as to proceedings in prize causes exist, not only by the express provisions of law, but also by the principles which apply to prize causes in this country, in England, and elsewhere.

*WASHINGTON*, Justice, delivered the opinion of the Court. To the writ of *habeas corpus*, issued by this Court, upon the petition of Peter Graham, the marshal has returned, that he arrested the petitioner under the authority of a warrant of attachment, issued from the Circuit Court of the United States, for the District of Rhode Island, to him directed, and which is annexed to the return, and is in the following words, to

*United States of America.* }  
 (L. S.) Rhode Island District, } ss.

The President of the United States of America, to the respective marshals of the respective Districts of Rhode Island, New-York, and the Eastern and Western Districts of Pennsylvania, greeting:—

Whereas, a certain bale or box of merchandise, marked, numbered 97—imported into the United States in the ship *Francis*, and condemned to the captors, in the case of the libel of Oliver Wilson and others against the ship *Francis* and cargo, in the Circuit Court of the United States, for the Rhode Island



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District, at the June Term of 1812, of said Court. And whereas, the said bale or box of merchandise was delivered to one James Stewart, by the Inspectors of the District of Bristol, by mistake, who took and carried away the same; and whereas, a representation to the said Circuit Court, at their November Term 1813, by the said Oliver Wilson, in behalf of the said captors, and on their petition therefor, the said Court granted a monition to said James Stewart, to show cause, why he should not bring said bale or box of merchandise, or the proceeds thereof, into the said Court, which monition was duly served upon the said James Stewart; and whereas, the said James Stewart neglected to appear to said monition, and was, and ever since has been, in contempt therein; said Court, upon petition therefor, in behalf of the said captors, granted a writ of attachment against the said James Stewart, which he hath avoided by absconding and departing from the United States; and whereas, afterwards, at the November Term 1816, of said Circuit Court, it was represented to said Court, by the proctors of the said James Stewart, that said bale or box of merchandise, or the proceeds thereof, were in the hands of one Peter Graham, of Philadelphia, merchant, and praying process against him; and whereas, said Court, at said Term, granted a monition to the said Peter Graham, to bring said bale or box of merchandise, or the proceeds thereof, into said Court, or, in default thereof, to appear, to show cause, why an attachment should not issue against him; and whereas, the said monition was duly served upon the said Peter Graham, and he hath neglected to appear thereto, and was and is in contempt therein; and whereas, application hath been made to the said Court, at their June Term 1818, in behalf of said captors and said James Stewart, for further proceedings against the said Peter Graham, in the premises; and the said Court, at the said Term last mentioned, at the instance of the said applicants, did order a writ or warrant of attachment to issue against the said Peter Graham, for said contempt; and, in case the said Peter Graham could not

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be found, did further order, that the same writ or warrant of attachment should contain a clause, in that event, to seize, arrest, and sequester the goods and effects of the said Peter Graham, to the amount and value of two thousand dollars, wherever the same might or could be found within the United States, and the same safely to keep, to abide the further orders of the said Court,—

You are, therefore, hereby commanded, in the name of the President of the United States, that you do attach and arrest the said Peter Graham, if he may be found in your District, and to hold him in close custody, to answer the said Court, for his contempt aforesaid. And if the said Peter cannot be found within your District, then that you do seize, and arrest, and sequester the goods and effects of the said Peter, if the same may be found in your District, to the amount and value of two thousand dollars, the same safely to keep, to abide the further orders of said Court, in the premises. Hereof fail not, but true return make of this warrant, with your doing thereon, to the next Term of the said Circuit Court, to be holden at Providence, within and for the said Rhode Island District, on the fifteenth day of November next.

Witness, the Honourable John Marshall, Esq. our (L. S.) Chief Justice, this ninth day of July, in the year of our Lord, one thousand eight hundred and eighty.

Signed,

BENJAMIN COWELL, Clerk.

The question turns upon the authority of the District or Circuit Court of one District, to issue its process into any other District, to compel the appearance of a person, residing or found within the latter jurisdiction, before the Court from which the process issued; or to stand committed, for any alleged contempt of that Court.

It is admitted, that these Courts, in the exercise of their common law and equity jurisdiction, have no authority, gene-

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rally, to issue process into another District, except in cases where such authority has been specially bestowed, by some law of the United States. The absence of such a power, would seem necessarily to result from the organization of the Courts of the United States; by which two Courts are allotted to each of the Districts, into which the United States are divided; the one denominated a District—the other a Circuit Court.

This division and appointment of particular Courts, for each District, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective Districts, within which they are directed to be holden. Were it otherwise, and the Court of one District, could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the District, there would result a clashing of jurisdiction between those Courts, which could not easily be adjusted; and an oppression upon suitors, too intolerable to be endured.

But the legislature of the United States, from abundant caution, as it would seem, has not left this subject to implication. After conferring upon those Courts, respectively, the portion of jurisdiction which Congress intended they should exercise, the 11th section of the Act of 24th September 1789, chap. xx. declares: "that no person shall be arrested in one District, for trial in another, in any civil action, before a Circuit or District Court; nor can a civil suit be brought before either of those Courts, against an inhabitant of the United States, by any original process, in any other District, than that whereof he is an inhabitant; or in which he shall be found, at the time of serving the writ."

These provisions appear manifestly to circumscribe the jurisdiction of those Courts, as to the person of the defendant, by the limits of the District where the suit is brought; and that the process of those Courts, was considered by the legislature, to be bounded by the same limits, is obvious from the subsequent Acts passed, the one on the 2d of March 1793,

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ch. 23, s. 6; authorizing subpoenas for witnesses, in any of the Courts of one District, to run into any other District, not exceeding, in civil cases, one hundred miles from the place of holding the Court; and the other, on the 3d of March, 1793, ch. 74, s. 6, which authorizes writs of execution upon judgments obtained, *at the suit of the United States*, in any of the Courts, in one state, to run and be executed in any other state or territory.

It would seem, that these provisions were made, not because they were supposed by Congress to be necessary, in consequence of the 11th section of the Judiciary Law; but because the jurisdiction of the Courts, was essentially confined, by their organization, within the limits of their respective districts; for, it is to be observed, that that section applies exclusively to *original suits*, and to the *parties in those suits*; and therefore imposed no restraint, in respect to writs of execution, and subpoenas for witnesses, which could render the above provisions at all necessary.

But it has been argued, that these restraints are incompatible with the essential jurisdiction of an Admiralty Court, more especially in prize causes.

That the laws of the United States authorize the distinction which is contended for, between the Courts of Common Law and Equity; and the admiralty jurisdiction in prize cases, is not, and it is confidently believed, cannot be shown.

It is true, that the 9th section of the Judiciary Act, gives to the District Courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, without limitation; and it is not less true, that the 11th section gives to the Circuit Courts, original cognizance of all suits of a *civil nature*, at Common Law and in Equity, where an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state, equally unlimited, except as to the amount. But the jurisdiction of these Courts, though unlimited as to the *subject matter* of which they have

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cognizance, by any express declaration of the legislature, is nevertheless limited, in point of *locality*, as well by the general principles of law, which our Courts acknowledge as rules of decision, as by the express provisions of the 11th section of the Judiciary Law before mentioned. As to the first, it will be acknowledged, that there is no law of Congress which limits the jurisdiction of the Courts, by the *nature of the suits* of which they have cognizance. By what law, then, is it, that actions of ejectment, dower, and trespass, in relation to real property, can be brought only in the district where the land lies?

If the defendant be served with process in the district where the suit is brought, neither the 11th section, nor any other provision in the Act of Congress, has restrained the jurisdiction of the Court in the supposed cases. The only answer to the question is, that the want of jurisdiction is the result of certain general principles of law, acting upon the particular subject.

In like manner, the jurisdiction of these Courts, when sitting in an admiralty or prize cause, is limited by those general principles which apply to Courts of Admiralty in England and the United States, as well as in other countries. Though founded only by the nature of the causes over which they are to decide, and not in any respect by *place*; it is nevertheless essential to the exercise of this jurisdiction by any particular Court, that the person or thing against whom or which the Court proceeds, should be within the local jurisdiction of such Court. Such was the jurisdiction of the several Vice-admiralty Courts of Great Britain, in America, and the West Indies, until the statute of the 41st of George III., which, whether sitting as instances of prize Courts, were confined to breaches of the revenue laws, committed within their local jurisdictions, and to cases of vessels, &c., brought within their local jurisdiction. The only exception to the general rule above stated, applicable to the Court of Admiralty, in prize causes, is that of a vessel

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lying in the port of a neutral country, most unwillingly assented to by Sir W. Scott, under the sanction of precedent, but powerfully opposed by the reasons urged against it by that distinguished Judge. But even in that case, it was never pretended that the process of the Court, could go into the neutral country, to compel an appearance, or to enforce the execution of the sentences.

But secondly, the jurisdiction of these Courts in prize causes, is limited, as to persons, by the express provisions of the 11th section of the Judiciary Law before referred to.

Prize proceeding against an inhabitant of the United States, is unquestionably a civil suit; and if it be against the person, instead of the thing, the jurisdiction is excluded, unless it be instituted in the Court of the District whereof he is an inhabitant, or is found at the time of serving the process. The manifest policy of the judicial system of the United States, was to render the administration of justice, as little oppressive to suitors and others as possible; and it corresponds entirely with that construction, which confines the process of the Courts within the limits of the district in which the Court sits, and from which it issued.

In the exercise of a jurisdiction over persons not inhabitants of, or found within the district where the suit is brought, there are difficulties, which, in the opinion of the Court, nothing but an Act of Congress can remove. In what manner, for instance, is the marshal to dispose of the person? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the marshal of an adjoining district, for that purpose. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisprudence, that of a defendant, imprisoned in one district, to answer to a suit depending against him in another, how great soever the distance of the one place might be from the other.

In criminal cases, where the offender is arrested in one dis-

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Ex parte Graham.

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trict, for trial in another, the 33d section of the Judicial Law has provided, not only for the removal of the offender and witnesses, but also for the transmission of the process and recognizances taken in the case, to the proper Court. In like manner, should it be the will of Congress to vest in the Courts of the United States an extra-territorial jurisdiction in prize causes, over persons and things found in a district other than that from which the process issued, it would seem to be proper, if not absolutely necessary, at the same time to prescribe the mode of executing the process.

Upon the whole, we are of opinion, that the petitioner ought to be discharged.

CHANDLER, and BINNEY, for Graham.

CHARLES J. INGERSOLL, against the discharge.

UNITED STATES

Associate Justice of the  
Supreme Court

the revenue officer, of  
the incurred, for a viola-  
tion by the collector of  
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Sawyer et al. vs. Steele.

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having instituted this suit, does not constitute a waiver of their right to their share of the forfeiture.

The defendant is not liable to the plaintiffs, for such part of the proceeds of the forfeiture as he had paid over to other officers of the custom-house, for their shares, before notice of the claims of the plaintiffs.

**T**HIS was an action of *indebitatus assumpsit*, for money had and received by the defendant, to the use of the plaintiffs. The case, with the material parts of the evidence, are stated in the charge.

*WASHINGTON, Justice*, charged the jury. This is an action of *indebitatus assumpsit*, for money had and received, brought by the officers of the revenue cutter *General Green*, belonging to the Delaware District, against the collector of this District, to recover their proportion of the forfeiture incurred by the *Perseverance*, for a breach of the Non-Intercourse Law, in 1812.

The information against this vessel and her cargo, was filed in the District Court of Pennsylvania, and a condemnation was decreed, which was affirmed in this Court; and the proceeds having been paid over to the defendant by the marshal, the plaintiffs claim one half of the amount, alleging, that the forfeiture incurred was recovered, in consequence of information given by them, as officers of the above-mentioned revenue cutter. The question is, are the plaintiffs entitled to recover any thing? and if any thing, how much?

The 18th section of the Act of Congress, of the 1st March 1809, ch. 91, entitled "An Act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes," vol. 4, p. 217, declares,

"That all penalties and forfeitures, arising under or incurred, by virtue of this Act, may be sued for, prosecuted, and recovered, with costs of suit, by action of debt in the name of the United States of America, or by indictment or information

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Sawyer et al. vs. Steele.

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in any Court having competent jurisdiction to try the same; and shall be distributed, and accounted for, in the manner prescribed by the Act entitled, "An Act to regulate the collection of duties on imports and tonnage," passed the second day of March, one thousand seven hundred and ninety-nine; and such penalties and forfeitures may be examined, mitigated, or remitted, in like manner, and under the like conditions, regulations, and restrictions, as are prescribed, authorized, and directed, by an Act entitled "An Act to provide for mitigating or remitting the forfeitures, penalties, and disabilities, accruing in certain cases therein mentioned," passed the third day of March, one thousand seven hundred and ninety-seven, and made perpetual by an Act passed the eleventh day of February one thousand eight hundred."

The 91st section of the Duty Law, above referred to, entitled "An Act to regulate the collection of duties on imports and tonnage," ch. 128, vol. 3, p. 223, enacts,

"That all fines, penalties, and forfeitures, recovered by virtue of this Act, (and not otherwise appropriated,) shall, after deducting all proper costs and charges, be disposed of as follows:—one moiety shall be for the use of the United States, and be paid into the Treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer. Provided, nevertheless, that in all cases where such penalties, fines, and forfeitures, shall be recovered in pursuance of information given to such collector, by any person other than the naval officer or surveyor of the district, the one half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor, or surveyors, in man-

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any aforesaid. Provided, also, that where any fines, forfeitures, and penalties, incurred by virtue of this Act, are recovered in consequence of any information given by any officer of a revenue cutter, they shall, after deducting all proper costs and charges, be disposed of as follows:—one fourth part shall be for the use of the United States, and paid into the Treasury thereof, in manner as before directed; one fourth part for the officers of the customs, to be distributed as hereinbefore set forth; and the remainder thereof to the officers of such cutter, to be divided agreeably to their pay.”

Before examining this case upon its merits, it may be proper to dispose of some preliminary objections, not only to the right, but to the quantum claimed by the plaintiffs.

1. It is insisted, that the plaintiffs are not entitled to any share of the forfeitures incurred, under the Non-Intercourse Law, because the Act of the 6th May 1796, ch. 22, making further provision relative to the revenue cutters, is confined to forfeitures incurred under the Impost Laws, and recovered, in consequence of information given by the officers of these cutters.

It is true, that that law is so confined; but the answer to the objection is, that the present action is not founded on the Act of May 1796, but on the 18th section of the Act of the 1st of March 1809, before referred to, which allows to these officers a certain proportion of the forfeitures incurred for a breach of the Non-Intercourse Law, where they are the informers.

2d. That if the plaintiffs are entitled to any thing, it can only be to one-fourth of the forfeiture, the United States being, in all events, entitled to one-half.

This is not, in the opinion of the Court, the true construction of the 91st section of the Duty Law, which prescribes the manner in which forfeitures for breaches of the Non-Intercourse Law are to be distributed. If there be no informer, the United States are entitled to one-half, and the custom-house officers to the other. If there be an informer, then, instead of the half,

which, in the former case, was given to the custom-house officers, one-fourth is allowed to them, and the other fourth to the informer. But if the informer should happen to be an officer of a revenue cutter, then only one-fourth is reserved to the United States; the same proportion is allowed to the custom-house officers; and the remainder, which is one-half of the whole, is given to the officers of the cutter. It is no argument, to say that this is an unreasonable allowance.—The legislature has thought proper to make it, and our duty is to execute its will.

3. The plaintiffs, claiming as officers of a revenue cutter, it is contended, that they cannot recover, without having given their commissions in evidence.

There is nothing in this objection, as it was fully proved by the collector of the port of Wilmington, and denied by no witness, that Sawyer was the commander of this revenue cutter, which was under the control of that collector; and that the other plaintiffs were mates on board of her, and that they acted as such officers. The commissions of these officers, being always the same in form, no question has been made, or can occur, as to the construction of theirs; and it is quite sufficient, in this action, that they acted in the capacities mentioned by the collector.

4. The last objection is, that these plaintiffs cannot join in this action; but should have sued separately.

This is a question of a good deal of difficulty; and will require more consideration, than it is in the power of the Court now to bestow upon it. If the jury, therefore, should find for the plaintiffs, we shall request them to reserve this point.

We come now to the questions which arise upon the merits of the cause.

The first is, whether the forfeiture incurred by the *Perseverance*, was recovered, in consequence of any information given by the plaintiffs, or either of them?

The law does not require that the information shall be as full as the evidence which may ultimately be given at the trial, or which may be necessary to establish the forfeiture. It is sufficient, if it be acted upon, induces the prosecution, and contributes eventually to the recovery. Any information, is the expression used in the law; and if, therefore, it should furnish the ground of inquiry, prosecution, and recovery, the informant is entitled to the reward; although he was unable to assert positively, that the offence had been committed.

It is not necessary, that the informant should accompany the communication which he makes, by an assertion of his claim to a share of the forfeiture; or, that he should make the seizure, or concern himself with the prosecution, by causing its institution, or providing testimony to support it. With all these things, he has nothing to do. He may even be ignorant, at the time he gives the information, that he has any claim to assert. It is sufficient for him to show, that the information which he gave, caused the prosecution and recovery.

But it has been contended, that, where the information comes from an officer, whose duty it is to furnish it, as in the case of an officer of a revenue cutter, it will be considered as given in the ordinary discharge of his duty; and so not entitling him to the reward, unless he asserts his claim. If there were any thing in this argument, the law would have no operation in favour of those officers, who, the law always presumes, will perform their duty; and yet offers them sometimes an extraordinary reward for doing it. The policy of the legislature, in this case, is obvious,—it was to excite the vigilance of the officers of the revenue cutters, to detect, and to bring to light violations of the Revenue and Non-Intercourse Laws; and to secure their integrity, by such a reward, as would place them above any temptations, which the offenders could offer them.

Having thus given what appears to the Court to be the true construction of the law, it only remains to recapitulate the ma-

terial parts of the testimony. The collector of the District of Delaware has testified, that the first information which he received, respecting the cargo of the *Perseverance*, was from Sawyer, the commanding officer of the revenue cutter; and he is confident, that he never heard any thing in relation to the rum on board, prior to the information received from him. In confirmation of this fact, and to show the precise nature of the information thus communicated, a letter from Sawyer to the collector, bearing date the 6th of February 1812, which the witness stated was received the same day, was produced, in which the writer states, that there are strong grounds of suspicion against the *Perseverance*, to detain her; and amongst others, he mentions that "she has on board 97 hogsheads of rum, which the mate calls *agua ardenti*; but which I take to be Jamaica, and thereof good quality." On the 13th of the same month, another letter was written by Sawyer, to the collector, repeating the same information, and recommending the appointment of a particular person to taste the rum; and, on the 16th, he again wrote, and informed the collector that the District Attorney was of opinion, that the vessel and cargo were liable to forfeiture, and ought to be seized and libelled. The witness further stated, that, in consequence of the first information received from Sawyer, he directed the vessel to be detained; and that one of the officers of the cutter, was put on board of her, for that purpose. That being satisfied the rum was Jamaica, he consulted with the District Attorney, as to the course to be pursued, who advised a seizure of the vessel; which would have been done, had he not been induced by the persuasions of the owner, to send her to this District, for trial, under the command of Sawyer, who delivered her to the custom-house officer of this port.

In this evidence, we trace the active agency of the commander of the cutter, from the time when he first gave the information respecting the suspected cargo of this vessel, to that when

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Sawyer et al. vs. Steele.

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she was delivered into the hands of the defendant, to be proceeded against; and the question for you to decide is, whether the recovery of the forfeiture, which was ultimately obtained, was in consequence of information received from any officer of the revenue cutter. If it was, then,

2d. Was any thing done by the plaintiffs, which amounted to a waiver of their right to a share of the sum recovered?

The affirmative is contended for by the defendant, upon two grounds,—1. Because the plaintiffs consented to the removal of the vessel and cargo, from the Delaware to the Pennsylvania District, which, as it operated to an abandonment of the claim of the collector of that District to a share of the forfeiture, produced the same effect in relation to the claim of the plaintiffs. The answer to this is, that it is made the duty of the collector, where he has probable ground to suspect a violation of the Non-Intercourse Law, to make the seizure, and to proceed regularly against the offending article, in order to obtain its condemnation. If, instead of doing this, the collector, who receives the information, and may legally proceed to enforce the forfeiture, chooses to turn over the business to the collector of another District, and thus to abandon the claim which he might have asserted to a part of the sum to be recovered, the claim of the informant cannot be affected by the transaction, although he should have assented to it; because he has nothing to do with the seizure, or other proceedings. To him it is immaterial where the trial takes place;—his right to a share of the forfeiture, though inchoate, arises from the information, and is consummated by the recovery. His consent to the removal of the property, then, whilst it amounts to the assertion of an interest in the forfeiture, should it be decreed; (for otherwise his consent was not worth asking,) cannot in any manner affect that interest. In short, this is not a case, where a jury would be justified in presuming a waiver. It is much more likely, that the plaintiffs were ignorant of their rights,

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than that, knowing them, they would voluntarily relinquish the chance of obtaining so considerable a sum of money.

2. The letter from Sawyer to the defendant, written after the institution of this suit, is supposed to amount to a waiver, at least of *his* claim to any part of the recovery. Whatever other answer might be made to this objection, this is sufficient, that the letter cannot be construed to apply to the claim, but merely to the suit, the institution of which, in his name, he disavows; and it is a fact, that, notwithstanding that letter, he has persevered in the suit to the present moment.

If the plaintiffs are entitled, under the law, to a share of the forfeiture of this vessel and cargo, and have not waived their claim to it, the only remaining question is—3. Are they entitled to recover any thing; and if any thing, how much, from the defendant?

No evidence was given, nor is it even pretended, that any notice of this claim was given to the defendant, by the plaintiffs, or by any other person, until the institution of this suit, in November 1817; before which time, 4953 dollars, the supposed share of the custom-house officers, had been paid; the other moiety was not paid into the Treasury of the United States, before the year 1818.

If the defendant had paid over the whole of the sum recovered to the United States, and the custom-house officers, before he received notice of the claim of the plaintiffs, he would not have been liable in this action for any part of the sum which he had so parted with; because, being appointed by law an agent to receive, and to distribute the money, (where there is no informer,) between the United States and the custom-house officers, he was strictly in the performance of his duty in so distributing it, unless he had notice that there was an informer, and that an officer of the revenue cutter was that informer. The law could never be so unreasonable, as to punish a public officer for doing what itself had enjoined, unless a certain circumstance



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existed, of which he had not notice. It is to be remarked, that the distribution of forfeitures, is to be in moieties between the United States and the custom-house officers; and that a different distribution is not to be made, unless there be an informer. Surely, then, if there be an informer, the collector ought to be apprized, before he makes the distribution, who he is. If, for want of such notice, the informer has lost his recourse against the collector, it is attributable to his own neglect; the consequence of which, it would be most unjust to permit him to shift from his own shoulders to those of the defendant. It is obvious, that the difficulty in this case arises from the uncommon circumstance, that the information was given to the collector of a district, within which it was expected the seizure would be made, and where the suit for the forfeiture might have been prosecuted; instead of which, the vessel, with her cargo, was sent by that collector, to the collector of another district, where the suit was instituted and the recovery obtained. In ordinary cases, the collector can never be ignorant on whose information he acts, where there is an informer.

The Court is therefore of opinion, that the defendant is not liable to the plaintiffs, for any part of the money paid by him to the other officers of the custom-house, or of the share to which the United States are *legally* entitled.

If the jury should be of opinion, that the plaintiffs were, in point of fact, informers within the meaning of the Act of Congress as before explained, and that the defendant had not notice of the plaintiffs' claim, as informers, before the 4955 dollars were disposed of; then, in estimating the damages to which the plaintiffs are entitled; they ought to deduct the sums *actually paid* to the naval officer and surveyor, the proportion to which he himself was *legally* entitled, (for the balance is still in his hands,) and the proportion to which the United State were *legally* entitled, from the net sum received by him, and your verdict ought to be for the residue. Thus—

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Amount of recovery, after costs and charges	
deducted, - - - -	\$ 9911 00
Paid the naval officer and surveyor, \$ 3310 00	
Share of the United States, -	2477 87½
Share of the collector, -	827 50
	<hr/> 6615 37½
	<hr/> \$ 3295 62½ .

As to interest, which is claimed from the time this suit was instituted, the Court leave that question to the jury.

*The jury found for the plaintiffs \$3295 62½ if the Court should be of opinion, &c. &c.*

Joseph R. Ingersoll, for the plaintiffs.

Charles J. Ingersoll, for the defendant.

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 Lessee of Potts vs. Gilbert,
 

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## LESSEE OF POTTS vs. GILBERT.

The Statute of Limitations, of Pennsylvania, is substantially the same as that of the 21st James I. ch. 16. The limitation begins to run from the time of an actual adverse possession, and not before.

A grant from the Commonwealth of Pennsylvania, passes a *legal possession* to the grantee, which continues until disturbed by an *actual adverse possession*. The title vests in the grantee, upon the return and acceptance of the survey and payment of the purchase money; and the legal possession vests at the same time.

- Adverse possession must continue, in point of locality, during the twenty-one years. A possession of part of a tract of land, short of twenty-one years, cannot be joined to a possession of another part, so as to make up the period. The possession of different intruders, in succession, upon the same part of the tract, cannot be added together by the last intruder, so as to make up twenty-one years of adverse possession, against the real owner.

The possession of the dispossessor, to bar the plaintiff, can never extend beyond the limits of the particular spot upon which he is seated; and the legal possession of the owner continues unaffected as to the residue of the tract, by such tortious possession; and his legal possession revives, the moment the intruder quits the part of the tract he may have occupied.

A sale, by one intruder to another, without an exact definition of the property conveyed, will not aid the purchaser in establishing a continued adverse possession. *Semble*. That an intruder, who has not had twenty-one years' possession, has no title to convey.

**T**HIS was an ejectment to recover 300 acres of land. The plaintiff produced a regular title from the Commonwealth of Pennsylvania, commencing with a warrant in 1784; payment of the purchase money in the same year; return of survey in the year 1788; and a patent in 1800.

The defendant produced a special warrant, dated in 1773, for the same land, to Samuel Clark; and a survey of the same,

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Lessee of Potts vs. Gilbert.

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in 1803, with an endorsement "that it interfered with the survey of Potts," under which the lessee of the plaintiff claimed.

On the part of the plaintiff, it was proved, by the deposition of Jonathan Stevens, a deputy-surveyor, that, in the year 1813, or 1814, the defendant applied to him to know if this land was vacant—saying, that if it was so, he wished to purchase it from the state; if otherwise, he wanted to discover who had the office title. The witness informed him, that a warrant for this land had issued to Samuel Clark, in 1773, which had been surveyed in 1803.

On the part of the defendant, the following depositions were read—

N. Hicock, who stated, that, in 1794, one Eickter sent a person on the land, to build a cabin. In 1793, that there was a sugar bush on it. That part of Eickter's family resided on the land in 1794. In 1795, Gibson, with his family, resided on the premises, in a comfortable house, having a small piece of ground cleared. There has been, ever since, some person on the land; and there is now 20 or 30 acres cleared.

R. Gough deposed, that, in 1793, Eickter went on the land, with part of his family;—in the fall of the same year, Gibson bought him out, and went on; and there has been, ever since, some person on the land,—understood that they claimed only by possession.

J. Lewis deposed, that, in July 1794, Gibson lived on the land—had a good house, and four acres in corn. Gibson bought of one Means, and sold to Dougherty, who lived eighteen years on the land, and then sold to Bowman, who sold to the defendant. There has always been one or more families on the land, since he knew it.

The deed from Dougherty to Bowman, dated in 1810, and from Bowman to the defendant, dated in 1813, were given in evidence.

Stacey Potts was examined by the plaintiff, who stated, that,

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Lance of Potts vs. Gilbert.

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in 1810, the defendant applied to him to buy this land; but, on account of Clark's survey, he declined selling.

This suit was commenced in the year 1817.

Ingersoll and Baldwin for the defendant, contended, 1st. That the warrant and survey of Clark, showed the title to be out of the plaintiff: 2d. That the plaintiff was barred by the Act of Limitations of this state, as he had made no entry on the land, from the year 1788; and that an adverse possession had continued, since the year 1793, exceeding the twenty-one years mentioned in the statute. They therefore claimed a verdict for 200 acres, the quantity conveyed by Dougherty to Bowman, and by Bowman to the defendant. They further contended, that the jury ought to presume a conveyance from Clark to Eickter, and conveyances by the different persons who came into possession, to their successors. Cases cited, 1 Philip's Evid. 119. 2 Esp. 6. Ballentine on Limitations, 32. 4 Taunt. 16. Cowp. 215. 2 Inst. 118.

Tilghman and Sergeant, for the plaintiff, contended, that a possession to defeat the right of the plaintiff, by virtue of the Act of Limitations, must be actual, adverse, and continuing, under a claim or colour of title; without which, the presumption is, that the possession was not adverse; and that, at all events, if all these requisites were proved, which they denied to be the case, still the defendant could not protect more than the land actually held by adverse possession, which ought to be designated. Cases cited, 1 Johns. Rep. 158. 2 Idem, 230. 3 Idem, 388. 9 Idem, 163. 174. 10 Idem, 475. Also, Hall vs. Powel, decided in the Supreme Court of this state. 8 Cra. 229. 2 Caines, 183. 3 Johns. Cases, 124.

*WASHINGTON, Justice*, charged the jury. The only defence, seriously relied upon in this case, is the Act of Limitations; because, as to the title of Clark, it cannot be used against the plaintiff, whose title was perfected in the year 1800, three years before Clark's warrant was even surveyed; and

this was not accomplished, until thirty years after the date of the warrant; nor was any part of the purchase money ever paid.

The Statute of Limitations of this state, is, in substance, the same as that of 21 Ja. 1. c. 16; and declares, that no entry shall be made on land, but within twenty-one years next after the right or title to the same descended or accrued.

In the construction of both statutes, it has always been held, that the actual entry of the owner, is not necessary to prevent the operation of the law, unless an actual adverse possession is taken by a stranger; from which time, and not before, the limitation begins to run. The grant of land, by the government, passes at once to the grantee the *legal* possession, as well as the title; which continues, until he is disturbed by an *actual adverse* possession. This was decided in the case of *Greene vs. Lister*, 8 Cra. 229. According to the law, as decided in this state, the title of the commonwealth vests in the grantee, upon the return and acceptance of his survey, and payment of the purchase money; and, consequently, the legal possession must be vested in him at the same time.

- The adverse possession before mentioned, must not only continue, but it must continue the same, in point of locality, during the prescribed period of time, sufficient to constitute it a bar; that is to say, a roving possession from one part of a tract of land to another, cannot bar the right of entry of the owner, upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels, should amount, in the whole, to that number of years. For, it is a clear principle of law, that the right acquired by the adverse possession of a disseisor, or of one who enters, or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation is confined. If he could go beyond these limits, there would exist no other to circumscribe his claim. He cannot resort to the metes and bounds of the tract upon which he

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Lessee of Potts vs. Gilbert.

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has settled; because the legal possession of the owner continues unaffected by the tortious entry, except so far as the actual adverse possession has disturbed it. The legal owner is constructively in possession of the whole tract, because his title extends to the whole;—a wrongdoer can claim nothing in relation to his possession by construction.

Whether, to support the possession of a person who enters without title, and who encloses, improves, and cultivates it, and continues the same peaceably for the space of twenty-one years; it is incumbent upon him to show that such possession was taken and continued under a *claim or colour of title*; is a question of great importance, and in our opinion, of no small difficulty. The affirmative of this question, seems to be maintained by the learned Judges of New-York, and the opinion is therefore entitled to our highest respect. Our own mind is not decided upon the point; and as it is not material to the decision of this case, we shall express no opinion upon it.

But the Court is perfectly clear, that where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possessions of his predecessors to his own, so as to make out continuity of possession, sufficient to bar the entry of the owner. The possession of A, the first occupant, cannot be the possession of B, the next occupant; because the moment A quits the actual possession, the legal possession of the real owner is restored, and the entry of B constitutes him a new disseisor; and if he seek to bar the entry of the owner, he must show an actual adverse possession, continued in himself for twenty-one years. There is no privity between A and B.

Neither do we think the present case is strengthened, in favour of the defendant, by the evidence of the witnesses, that the several occupants sold to their successors. Nothing can be more vague than this testimony. It does not state, that any conveyances were executed, or what each person sold;—whe-

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Lessee of Potts vs. Gilbert.

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ther it was title, possession, or good will; or whether any two of the sales were applicable to the same spot. Indeed, what had any of them, in point of title, to sell?

Not only is an adverse possession to bar an entry, to be confined to the particular parcel so occupied, but some evidence should be given to show the location of such parcel, that it may be seen, whether the continuity of possession, during the whole period, was applicable to it or not.

*Verdict for plaintiff.*



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 Lessee of Musser vs. Curry.
 

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## LESSOR OF MUSSER vs. CURRY.

By the laws of Pennsylvania, the Register of Wills is authorized to take the Probate of Wills, copies of which, with the wills, under his seal, are declared to be matters of record and good evidence. This authority extends to re-published wills and codicils, which, in reference to after acquired lands, are as new wills.

The same evidence is necessary to prove a re-publication, as a publication; and proof of such re-publication by one witness, will not be sufficient.

THE plaintiff claimed as heir at law of John E. Allen, and fully established his title as such.

The defendant was the husband of Susanna Allen, the natural daughter of John E. Allen, and claimed the property in dispute, under the will of Allen, as tenant by the courtesy; his wife, and the child he had by her, being dead. It was conceded, by the plaintiff's counsel, that the clause in the will, under which the defendant claimed, passed to his late wife an estate of inheritance; but it was denied that the will operated on the property in question, as it was acquired after the will was made.

The date of the will is in the year 1805; and the property in dispute was conveyed to the testator on the 13th of June 1812. The defendant insisted, that the will was re-published after the above period, and this was the turning point of the cause.

The will was proved by two of the subscribing witnesses, on the 28th of August 1813, before the Register of Wills, and certified accordingly. On the 10th of November of the same year, one of the witnesses made oath, before the same officer, that the testator had, on the 23d of August 1813, re-published his will in his presence, at which time he was of sound and disposing mind and memory. Evidence having been given of the death of this witness, the defendant offered to prove his

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*Lenox v. Hunter et. al.*


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signature to the oath endorsed on the will, and certified by the Register, which was opposed by the plaintiff's counsel, on the ground that the Register has no power to receive the probate of a *re-publication*, but that, having once received the proof of *publication*, he was *functus officio*, and his certificate of subsequent proof of re-publication, was no more than the certificate of any other person, and consequently inadmissible as evidence.

*WASHINGTON, Justice*, delivered the opinion of the Court. The Register is authorized, by the law of Pennsylvania, to receive the probate of wills; and copies of such wills and probates, under the public seals of the Courts, or offices, where the same shall have been taken, or granted, if in force, are declared to be matters of record, and good evidence to prove the devise thereby made.

The authority of the Register being general to take the probate of wills, extends as well to the re-publication as to the publication of a will. The will, in relation to after acquired property, is a new will, by virtue of the re-publication; and the probate belongs to the Register, under the literal expressions of the law, as well as under its plain and obvious meaning. For, if on account of the want of a Court of Chancery, to perpetuate the testimony of the witnesses to a will, or for any other cause, the probate of the will before the Register was to be received as evidence of the devise of land, the same reason would seem to have required, that the re-publication should be proved in the same way. A codicil amounts to a re-publication; and there can be no doubt, but that the Register, having received probate of the will, may afterwards receive probate of the codicil, which does not differ materially from the present case.

But the same evidence is necessary to prove a re-publication, as the publication. The proof before the Register was only that of one witness, which is not sufficient, without further evidence, to establish the re-publication.

The defendant then examined two others of the witnesses to

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*Lesse of Mueser vs. Curry.*

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the will, to show that the will was re-published subsequent to the 13th of June 1812. The credit of one of these witnesses was powerfully attacked; and some degree of uncertainty, as to the time of re-publication, accompanied the evidence of the other.

The Court stated to the jury, that the cause turned altogether on the fact, whether the will was re-published after the 13th of June 1812, or not; and left it to them to weigh the credit of the witnesses, and to find their verdict according to the conclusion they might come to as to that fact.

*Verdict for plaintiff.*

Peters, and Newcomb, for plaintiff.

J. R. Ingersoll, for defendant.

## CIRCUIT COURT OF THE UNITED STATES.

NEW-JERSEY, OCTOBER TERM, 1819, AT TRENTON.

VENUE { Hon. BUSHROD WASHINGTON, Associate Justice of the  
          { Supreme Court.  
          { Hon. WILLIAM S. PENNINGTON, District Judge.

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### CRAWFORD AND M'CLEAN *vs.* THE WILLIAM PENN.

A variance in pleading, which would be fatal at Common Law, may not be so in Courts which proceed according to the Civil Law; as the rules which govern the former Courts, are seldom applicable to proceedings in the latter.

The Court, proceeding under the Civil Law, will not allow a party to be surprised by evidence, materially variant from the case stated in the pleadings, but will allow an amendment; yet, if the statement of the case be not such, as can mislead the party, the Court will proceed to a decree.

Contracts made with an alien enemy, are lawful, if made in a trade carried on under license of the government, whether they arise directly, or collaterally, out of such licensed trade; or, if the enemy with whom the contract is made, be in the hostile country by license of the government; or if the contract be a ransom bond.

Contracts made by prisoners of war, in the enemy's country, for subsistence, are binding.

A demurrer in a case proceeded on, under the Civil Law, does not present the party, who demurred, controverting the facts confessed in the demurrer, and compelling the opposite party to prove them.

Rules of pleading, in Courts of Common Law, how far applicable in Courts proceeding according to the Civil Law.

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Crawford et al. vs. The William Penn.

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The master of an American vessel, in an enemy's country, may hypothecate the vessel, for money advanced to return to the United States, though the original voyage was broken up by capture, and the compulsory sale of the cargo.

In a libel on a bottomry bond, the libellant is always expected to prove, by other evidence than the bond, that the money was lent, and that the repairs were made, and materials were furnished, to the amount claimed; and that they were necessary to enable the vessel to perform the voyage, or for her safety, and that the money could not be otherwise obtained. He should exhibit an account of the items, for which the funds were expended, with the usual proof, that the Court may judge of their necessity.

IN this case, which was heard at April Term 1815, on plea, replication, and demurrer, (see 1 Peters's Rep. 106,) the Court overruled the plea, and ordered the respondent to answer the libel.

The respondent afterwards filed a number of pleas; but the third gave rise to the principal subject of controversy. This plea stated, that, at the time of the making and executing the said supposed instrument of hypothecation, in the libel mentioned, the libellants were aliens, born in foreign parts, out of the allegiance of the United States, and within the allegiance of a foreign state, viz. the United kingdom of Great Britain and Ireland, and not citizens of the United States, by naturalization, or otherwise; and that, at the same time, the said claimant, owner of the said ship, was a citizen of the United States, resident within the same; and that the said master was also a citizen of the United States—and that, at the time when the said bond was executed, there existed open and public war between the said United States, and the said United kingdom of Great Britain and Ireland; and that the said contract being made between alien enemies, the same was void, &c.

To this plea, the libellants replied, in substance, the former plea, replication, demurrer, order, and decree of this Court, concluding with an averment, that the matters contained in the

former plea, and in the said third plea, to which this replication is put in, are the same, and not different; and that, by reason of the proceedings aforesaid, the respondent is barred from denying the validity of the said contract of hypothecation.

Upon this plea, and replication, and others of minor importance, the case was argued at the last term, and it was contended by the respondent's counsel;—1. That it now appeared by the evidence, that the William Penn was not employed by the two governments, as a cartel; nor did she sail under a flag of truce.

2. The libel charges, that the hypothecation bond was given for a loan of money upon the ship, her tackle, and *freight*; whereas it appeared, upon the face of the bond, that it was given on the ship and tackle only; and the evidence shows, that it was not for a loan of money, but for repairs made, and materials furnished, by the libellants, as ship carpenters. These variances, the counsel insisted, were fatal to the plaintiffs' recovery. 2 Brown's Civ. and Adm. Law, 361. Bur. Rep. 369.

3. That the admission of the facts stated in the former replication, by the demurrer to it, does not preclude the respondent from now denying them, either by plea or answer. Goop. Eq. 321. Mkt. 239, 240. 244. 3 P. Wms. 94. 1 Ath. 460. 2 Idem, 284.

4. That all contracts with an enemy, in time of war, are void. Marsh. 741. 756. 1 Rob. 165; the Hoop, the Julia, and other cases decided in the Supreme Court of the United States.

5. That the bond is void, being for advances on a voyage different from the original voyage.

To this, it was answered, that the same strict rules of pleading, which govern Courts of Common Law, do not prevail in Courts proceeding according to the forms of the Civil Law; and that variances, unless material to the real justice of the case, are disregarded by the latter Courts.

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6. That the former admission, that this ship was a cartel, cannot now be retracted.

7. That though she were not a cartel, still this hypothecation was given under such circumstances of necessity, as will render it an exception from the general rule, which renders void all contracts made with an enemy; and the case was resembled to that of a ransom bond. 1 Ld. Ray. 282. Sack. 46. 3 Burr. 1734. Dougl. 698.

*WASHINGTON, Justice*, delivered the opinion of the Court. This is a libel founded upon a bottomry bond, executed on the 13th of April 1813, at Jamaica, by the master of the ship William Penn; on the ship, her tackle, and apparel, for the necessary repairs and outfit of the ship; to enable her to perform her voyage from that island to the United States.

The libel states, that the libellants did, on the day above mentioned, at Port Royal, in the island of Jamaica, lend on bottomry, on the said ship, her freight, tackle, and apparel, to the master of the said ship, £1,370 *ss. 4d.*, current money of Jamaica; the said port being a foreign port; and none of the owners of the said ship being at or near the same; the said captain being otherwise unable to procure the necessary moneys, to refit and victual the said ship, to complete his intended voyage, &c. &c.; a copy of which bond is annexed to the libel, as part thereof, &c.

To this libel, ten distinct pleas have been filed; some of which, with the replications to them, have given rise to the questions which the Court is now called upon to decide; and which may be comprised under the following heads:—

1. Whether there is such a variance between the libel and the bottomry bond, as ought to prevent a decree passing in favour of the libellants?

2. Whether the contract, being made with alien enemies, is void?

3. Whether the bond is void, upon the ground that the ad-

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vances were made, not to enable the master to complete his original voyage, which was to Lisbon, but to return to the United States, under a new contract to bring home American prisoners; as appears from the pleadings and the evidence to have been the case?

1st. That the variances pointed out exist, is unquestionable; and in an action at Common Law, it may be admitted, they would be fatal. But the Court cannot so easily admit the application of Common Law rules, to cases existing in Courts proceeding according to the forms of the Civil Law. To use an expression of Mr. Justice Story, in delivering the opinion of the Supreme Court, in the case of the *Adeline*, 9 Cra. 265, "no proceedings can be more unlike, than those in the Courts of Common Law and Admiralty." In the former, a variance between a written instrument on which the action is founded, as set out in the declaration, and the instrument itself, though a profert of it is made; may be taken advantage of upon oyer, or at the trial. But in the latter, the materiality of the variance to the opposite party, is the only ground upon which an objection can be founded. It is admitted, that the respondent ought to be informed, by the libel, of the nature of the demand to which he is to answer, so as to put it in his power to meet it fairly and fully. If the libel should not state the case with sufficient certainty, the Court will not suffer the respondent to be surprised, by a case different from that alleged, but will, as a matter of course, authorize amendments to be made, so as to remove the objection. But if either party has made a mistake in setting out this case, and yet not such as could mislead the other party; the Court will proceed to make a decree, notwithstanding the variance.

Such is the present case. The libel claims the *freight* as hypothecated contrary to the tenor of the bond. But then the bond itself is made part of the libel, and is referred to as the foundation of the hypothecation; and by this, the respondent was apprized that the freight was not hypothecated, and could



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not be demanded; and he must have perceived, that the mention of the freight, was a mistake of the proctor who drew the libel.

As to the other variance, it is equally immaterial to the real merits of the controversy; nevertheless, the libellants will be permitted to amend this libel, if they desire it, so as to produce a more exact correspondence between it and the case they mean to prove.

2d. This is the important question in the cause. But before we examine it, it will be proper to notice an argument of the libellants' counsel, intended to prove, that the consideration of this point, is precluded by the decision of the Court at the former hearing; which overruled the plea of alien enemy, and ordered the defendant to answer the libel. We understand the argument to be, that the demurres to the replication, which asserted that the William Penn was employed as a cartel, and sailed under the protection of a flag of truce, admitted that fact; and that the respondent is not now at liberty to controvert it, and again to rely upon the plea of alien enemy.

To this argument, the Court cannot accede, even if that were the case now before it for decision. According to the practice of the Civil Law Courts, a plea, whether dilatory or peremptory, is merely intended to put an end to the cause at an early stage of it; to avoid the expense and delay of going at large into it, if the Court should be of opinion, that the matter pleaded is sufficient to produce that effect. But the opinion of the Court, upon admissions of facts implied from the pleadings, will not prevent the party thus making the admission, for the purpose of obtaining a decision upon the law arising out of it, from controverting the same fact, and compelling the other party to prove it. This doctrine is exemplified, in the every-day practice of the Court of Chancery. If the defendant file a plea in bar, and the plaintiff set it down for argument, he necessarily admits the truth of the plea; as much so, as if he had demurred to it; for otherwise, the legal effect of the

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matter pleaded could not be decided. And yet, if the plea be allowed by the Court, the plaintiff may, notwithstanding his implied admission, reply to the plea, and deny the truth of the facts contained in it, and put the defendant to establish them by proof. *Solicitor's Guide*, 243-4. 235. *Gillb. Rep.* 124. *Coop. Eq.* 282.

The reason of the case just stated, applies with equal force to the present.

Nothing is more calculated to lead to error, than an indiscriminate application of the rules which prevail in Courts of Common Law, to Courts proceeding according to the forms of the Civil Law. A demurrer, for instance, in the former, is in chief, and is a perpetual bar, if judgment be against the party demurring; but if a defendant in Chancery demur, and it is overruled, he may afterwards insist upon the same thing by his answer. *Dormer vs. Fortescue*, 2 Atk. 284.

It has been thought proper to make these general observations respecting the practice of the Court of Equity, that the objection, so much relied upon by the libellants' counsel, may be put to rest.

But the present case steers perfectly clear of the objection, and would do so, even in a Court of Common Law. The matter of the plea, which, with the replication, formed the subject of inquiry at the former hearing of this case, was perfectly distinct from that contained in the third plea, now under consideration. That was a dilatory plea, to the disability of the libellants to sue, upon the fact asserted in the plea,—that they were, at the time the suit was brought, and when the plea was filed, alien enemies. This is a plea in bar, founded upon the matter set out in the plea, that, at the time the contract was entered into, the libellants were alien enemies; and, for that reason, the contract was void. The facts stated in the two pleas were, therefore, altogether different. This opinion brings into view the replication of the libellants to the third plea, which asserts the invalidity of the bottomry bond, on the ground that the con-

tract was made with alien enemies. The replication, instead of avoiding the bar, by alleging that the trading was licensed, on account of the sanctity attached to a cartel; or by stating any other facts, to withdraw the case from the operation of the general rule of law, relied upon in the plea; rests altogether upon the effect of the demurrer to the replication, put into the plea originally, and the decision of the Court upon it, as sufficient to preclude the defendant from putting in this plea. But, as the Court has just decided that the respondent is not precluded from relying upon this plea, it will be incumbent on the libellant, if he would avoid the force of it, to withdraw this replication, and to file another, setting forth such facts as he may think sufficient, in point of law, if they exist, to withdraw the case from the operation of the general rule. Upon the present pleadings, the decision must be in favour of the respondent on the third plea. But the libellant, if he desires it, will be permitted to amend; and as the pleadings on both sides, are drawn without a very strict observance of admiralty practice, it may be best, that the pleadings should be so constructed on both sides, as to present, in the most simple form, the points intended to be controverted. This will probably be most effectually accomplished, by filing a new libel, setting forth the whole case, to which pleas may be filed, stating the objections to the recovery.

Having disposed of these preliminary points, we come to the consideration of the main question,—whether *this contract*, being made with an enemy, is void?

The general rule is admitted, that contracts, made with an alien enemy, are void. Such is the law of nations, and of most, if not of all, the civilized nations of the world. The English and American decisions are positive in the establishment of this doctrine.

But to this, as to most general rules, there are exceptions. Contracts, made with an enemy, under the license of the government, are valid; and may, in certain cases, be enforced even

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during the war, and that too, whether the contract arose directly or collaterally out of such licensed trade. So, if the enemy, with whom the contract is made, be in the hostile country by license of that government. So, a ransom bond, given to an enemy, to procure the discharge of the property and the person of the captured, we hold to be valid. Such was decided to be the law of England, in the case of *Ricard vs. Battenham*, 3 Burr, 1734, and in *Cornu vs. Blackburn*, Dougl. 641. Such, too, is the law of other countries on the continent of Europe. We are aware of the decision in the case of *Anthon vs. Fisher*, in the *Exchequer*, which is to the contrary; Dougl. 649, note; but never having met with a full report of the case, it is not easy to understand what were the particular reasons which led to that decision. How far it may have been influenced by the statute, making it criminal to give a ransom bond, which had passed prior to this decision, but after the ransom, is not clear. At all events, it was a case decided long after our Declaration of Independence, and even after the treaty of peace; and is therefore not to be considered as authority in the Courts of this country, so as to overrule the decision in *Ricard vs. Battenham*, which was made in 1765.

There are other cases, which are considered as exceptions, even in England, where the general rule is upheld with considerable rigour, founded upon the peculiar necessity of the case.

The case of the *Madona delle Grazie*, 4 Rob. in, is to say the least of it, a very liberal relaxation of the general rule. It would seem, from the modern cases, that contracts, made by prisoners of war in the enemy's country, have been supported. In the case of *Sparenburgh vs. Bannatyne*, 1 Bos. & Pul. 163, Chief Justice Eyre observes, that "modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war; which can hardly be carried on without the aid of our Courts of Justice." The other Judges agree with him.

Recoveries at *Msi Prius*, we understand, are common, upon

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contracts made with the enemy by prisoners of war, upon parole, for their subsistence. *Willison vs. Patterson*, East. Term, 1817, C., P.

The case of *Antoine vs. Morehead*, 6 Taunt. 237, is that of a bill of exchange, drawn on England, in the enemy's country, by one British subject, a prisoner of war, in favour of another British subject, also a prisoner of war, and by him endorsed to an alien enemy; in which case the contract was supported. It is true, that the Court seem to rely very much upon the circumstance, that the original contract was between British subjects. But it is impossible not to perceive, that the right of the alien enemy to recover upon such bill, after the return of peace, was founded upon a new contract with an alien enemy, by virtue of the endorsement; and that, if in all cases, a bill drawn by one subject in favour of another, may pass, by endorsement, into the hands of an alien enemy, the general rule of law might be indirectly subverted. We understand this case, therefore, as going the full length of establishing an exception to the general rule, in favour of prisoners of war, in the country of the enemy, contracting for necessities. Chief Justice Gibbs seems to place it upon this ground; by saying, that, "if the objection could be supported, to its full extent, many of our miserable fellow subjects, detained in France, must have starved." The case of *Daubior vs. Morehead*, 5 Taunt. 332, is a case like the former, in principle.

The principle on which this doctrine is founded, is strongly supported by the decision of the Supreme Court of the United States, in the case of *Haller and Brown vs. Jenks*, 3 Cra. 210. That was the case of an insurance upon a cargo, purchased at St. Domingo, by the owner of an American vessel, which had been forced into that island by distress, and was compelled by the government to dispose of her outward cargo, with the proceeds of which the cargo insured was purchased. The objection made to the recovery was, that the cargo so insured, was purchased contrary to the express provisions of the Nor-

## CIRCUIT COURT OF THE UNITED STATES.

NEW-JERSEY, OCTOBER TERM, 1819, AT TRENTON.

~~SENATE~~ { Hon. BUSHROD WASHINGTON, Associate Justice of the  
Supreme Court.  
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### CRAWFORD AND M'CLEAN *vs.* THE WILLIAM PENN.

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The master of an American vessel, in an enemy's country, may hypothecate the vessel, for money advanced to return to the United States; though the original voyage was broken up by capture and the compulsory sale of the cargo.

In a libel on a bottomry bond, the libellant is always expected to prove, by other evidence than the bond, that the money was lent, and that the repairs were made, and materials were furnished, to the amount claimed; and that they were necessary to enable the vessel to perform the voyage, or for her safety; and that the money could not be otherwise obtained. He should exhibit an account of the items, for which the funds were expended, with the usual proof, that the Court may judge of their necessity.

IN this case, which was heard at April Term 1815, on plea, replication, and demurrer, (see 1 Peters's Rep. 106,) the Court overruled the plea, and ordered the respondent to answer the libel.

The respondent afterwards filed a number of pleas; but the third gave rise to the principal subject of controversy. This plea stated, that, at the time of the making and executing the said supposed instrument of hypothecation, in the libel mentioned, the libellants were aliens, born in foreign parts, out of the allegiance of the United States, and within the allegiance of a foreign state, viz. the United kingdom of Great Britain and Ireland, and not citizens of the United States, by naturalization, or otherwise; and that, at the same time, the said claimant, owner of the said ship, was a citizen of the United States, resident within the same; and that the said master was also a citizen of the United States—and that, at the time when the said bond was executed, there existed open and public war between the said United States, and the said United kingdom of Great Britain and Ireland; and that the said contract being made between alien enemies, the same was void, &c.

To this plea, the libellants replied, in substance, the former plea, replication, demurrer, order, and decree of this Court; concluding with an averment, that the matters contained in the

The master is the servant of the owner; and from the nature of his station as such, he has authority to enter into contracts for the employment of the vessel, as well as such as relate to the means of employing her. His duty is to obey the orders of his owner, and to act with fidelity to him, and with a view to his interest. He appears in this character to the world, where it can never be known, by those who transact business with him, what may be his private instructions. The consequences to commerce would be disastrous indeed, if the owner, whose ship is repaired and fitted to perform a voyage by means of advances made in a foreign port, could relieve his property from the security given on it by the master; by asserting and showing that the voyage, for the performance of which she was refitted, was not the real voyage which the master was instructed to perform. In this case, the vessel was captured, and carried into the enemy's country; and the original voyage to Lisbon was thereby put an end to, by a compulsory sale of the cargo. The vessel was released, but could not leave Jamaica upon any voyage, without considerable expense in refitting and victualling her. What was the master to do? He could have her refitted, by agreeing to hypothecate her as a security for the advances; but he is told, that he cannot give a valid hypothecation, unless he will agree to go to Lisbon, at great expense, and without an object; or will return empty to the United States; although a freight had been offered him, sufficient, perhaps, to cover all her expenses and outfits. Is it possible, that it can lie in the mouth of the owner, who would alone be the victim of such a doctrine, and is benefited by a rejection of it, to urge this as an objection against the validity of the contract? It can only be necessary to state the case, to refute the argument. The truth is, that the authority of the master to hypothecate, is not restricted to necessities to enable him to complete his original voyage. It extends to the obtaining of supplies necessary for the safety of the vessel, and to enable him to perform any voyage which he is authorized by law to



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undertake; there being no collusion between him and the ledger to injure the owner. That the master, in this case, was authorized, and that it was his duty to return to the United States, under any legal contract intended for the advantage of his owners, is indubitable.

Another objection was taken by the respondent's counsel, to the sufficiency of the evidence to prove the debt for which this security was given, which need not be examined until the final hearing of the cause. It may be sufficient for the present, to observe, that the libellant, upon a bottomry bond, is always expected to prove, by evidence other than the bond itself, that the money was lent, or the repairs made and materials furnished, to the amount for which the vessel is liable;—that they were necessary to enable her to perform her voyage, or for her safety, and could no otherwise be obtained, &c. He ought to exhibit an account of those items, with the usual proofs to support them, that the Court may judge whether they were necessary for those purposes; because, unless they were, the master exceeded his authority as such, to bind the property of his owners.

The parties then asked leave to amend the pleadings, which was granted.

R. Stockton, and M'Kean, for the libellants.  
Griffin, and Cox, for the respondent.

## LESSOR OF JOELAN FOSTER vs. CLAYTON JOINER.

A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate.

When the defendant, in an ejectment, opposes to the plaintiff's title a superior and outstanding title in a third person, under whom he does not claim, it must be *subsisting and available*, and on which the asserted owner might recover in ejectment, if he was plaintiff. If such a title is barred by the Statute of Limitations, or by a *descent cast*, the defendant cannot avail himself of it, to protect his mere possession; he being a perfect stranger to the title.

IN the year 1749, John Wells conveyed by deed, the land in dispute, lying in New-Jersey, to three Indian chiefs, of whom Jacob Moates was the survivor, "to them, and their generation; and to endure as long as the waters of the Delaware should run," according to the usage of Indians.

On the 15th of June 1783, Jacob Moates duly made his last will and testament; and thereby devised this land to his three children, Charles, Mary, and Hannah; and departed this life in 1784:

Charles Moates survived his sisters; and, on the 9th of September 1797, he duly made his will; and thereby devised the land, except some small lots, to the lessor of the plaintiff, in fee, and died seized, some time in 1798.

The defendant set up no other title, except a lease made to him in 1806, by certain commissioners, appointed in virtue of an Act of the legislature of New-Jersey, to take care of this property for this tribe of Indians, called the Cohaxen Indians, saving the rights of all persons to the same.

The cause turned principally on the validity of the will of Charles Moates; which was remitted by the surrogate to the

*Lessee of Foster vs. Joice.*

Orphans' Court, for probate; in consequence of a caveat entered on behalf of this tribe of Indians. Probate was refused; but, on appeal to the surrogate-general, the decision of the Orphans' Court was reversed, and the will was duly admitted to probate.

The plaintiff's counsel, after examining one of the subscribing witnesses to the will, offered to read the deposition of another subscribing witness, (since dead,) taken in the Orphans' Court, in the trial there, as well as all the depositions taken upon that occasion.

It was contended, in support of this evidence, that it not only results from the provisions of the Act of Assembly, passed in 1813, Patt. Laws, p. 5; but that it was the uniform practice in the state Courts, to read the evidence given in the Orphans' Court, if the will was finally admitted to probate, in cases where its validity came into question in an ejectment.

The 2d section of this law provides, "that all wills and testaments which shall be made in writing, signed and published by the testator, in presence of three subscribing witnesses, and regularly proved, and entered upon the books of record or register, in the proper office for that purpose, shall be deemed sufficient to devise and convey any lands, &c., or other estate whatsoever within the province, as effectually as if the testator had conveyed the same in his lifetime; and the books, in which they are registered, may be given in evidence; and shall be accepted as sufficient evidence, at all times and places, where the said wills may be required to be given in evidence."

It was insisted, that the Court was to decide, whether the will had been regularly proved, and recorded, so as to give it the effect of a conveyance; which could only be done by examining the proofs given in the Orphans' Court, upon which it was finally admitted to probate by the surrogate-general. *Boon vs. Allen*, Penning. Rep. 39. 4 Boon. 204. 2 Idem, 40. 1 Gall. 422. 3 Day, 318.

The admission of this evidence was resisted, principally on

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*Leave of Foster to John.*


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the general ground, that the contest before the Orphans' Court respected personal property only, and was between different parties than those now before the Court; and, consequently, that the evidence was *ex parte* as to the defendant.

*Washington, J.* Upon what seems to me to be the reasonable construction of the Act of Assembly, I should have supposed, that the probate of a will, relating to land, before the Orphans' Court, or before the surrogate-general, would be conclusive in any other Court, where the validity of the will might incidentally come in question. But I understand, that a different opinion has prevailed in the Courts of this state; and I submit to the authority of that opinion.

But if this be the law, I am entirely at a loss to give any sensible interpretation of the 2d section\* of the Act, if the Court, in which the validity of the will is incidentally in issue, is precluded from examining the evidence taken in the Orphans' Court, that it may be seen whether the will was regularly proved or not. Suppose all the witnesses, whose depositions were taken, should die—how could it be decided on the trial of an ejectment, whether the will was regularly proved or not, unless the depositions are read? And if they cannot be read, then a will so proved and recorded, cannot be equivalent to a conveyance; because it never can be known, whether it was regularly proved and recorded, or not. I am therefore of opinion, that the evidence ought to be allowed.

*Pennington, J.*, was against admitting the evidence.

A number of witnesses were then examined; and the depositions taken in the Orphans' Court were read; (the defendant's counsel having waived the objection,) which presented much contradictory testimony, as to the sanity of the testator, and the fairness of Foster's conduct in obtaining the will.

\* The only question of law raised, was, whether the defendant should protect his possession, by the outstanding title in the heirs of John Wells; it being conceded on both sides, that the conveyance of 1740 passed only a life estate to the grantee.

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Legacy of Motes vs. Joice.

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• The defendant's counsel relied upon the case of *Roe vs. Harvey*, 4 Burr, 2457, & Bulk N. P., to show that the defendant may protect his possession, by a subsisting outstanding title in a third person, and that the plaintiff must recover upon the strength of his own title.

2. That the will of Jacob Motes, passed only an estate for life to Charles Motes; and, therefore, he had not such an estate as he could devise to the lessor of the plaintiff.

3. For the plaintiff, it was answered, that in no case can the defendant set up an outstanding title in a stranger, to defeat the plaintiff in ejectment, unless he shows that he himself claims under such title; and that the plaintiff may recover, even upon superior possession, against a mere intruder or disseisor, who comes into possession without a colour of title. 3 Wheaton, 724, note. 11 Johns. 509. 3 Blac. Com. 167.

*WASHINGTON, Justice.* 1st. As to the outstanding title in the heirs of Wells. Without giving any opinion as to many of the cases referred to in the note to 3 Wheaton, I feel no difficulty in saying, that wherever the defendant opposes to the plaintiff's title, a superior outstanding title in a third person, under whom he does not claim, it must be a *subsisting and available title*, on which the asserted owner of it might recover in ejectment, if he were the lessor of the plaintiff. If it be barred by the Act of Limitations, or by a descent cast, it would be quite absurd to contend, that the defendant, a perfect stranger to that title, can avail himself of it, to protect his mere possession. — That is precisely the present case. Upon the death of Jacob Motes, in 1764, the right of this land reverted to John Wells, or to his heirs. The entry of Charles Motes was that of an intruder, and *adversus* the title of Wells. He continued in possession until his death in 1798, when, by force of the 6th section of the Act of 1813, *Patt. Laws 6*, the possession vested in the lessor of the plaintiff, the devisee, (if the jury should establish the will,) without the necessity of an actual entry, af-

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*Lessee of Foster vs. Joice.*

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though some evidence of such an entry has been given. This possession continued until 1806,—more than twenty years after the entry of Charles Mootes.

But even if this were not the case, there has been an adverse possession to the title of the reversioner, more than twenty years,—sufficient to bar his right of entry. This outstanding title, then, cannot avail the defendant.

2d. As to this objection, there is nothing in it. It may be admitted, that the will of Jacob Mootes passed only a life estate to his son. In truth, it passed nothing, since Jacob did not hold adversely to, but under the reversioner, and had no estate in him which he could devise. Charles Mootes, on the contrary, gained, by his intrusion, a defeasible estate in fee, of which he died seized, and could dispose of by will; subject, however, to the better title of Wells.

*Pennington, J.*, did not concur in the opinion on the first point.

The question, as to the validity of the will, was submitted to the jury on the evidence.

*Verdict for plaintiff.*

Stockton, Griffith, and Cox, for lessor of plaintiff.

Ewing, and L. H. Stockton, for defendant.

**CIRCUIT COURT OF THE UNITED STATES.**

**PENNSYLVANIA, OCTOBER TERM, 1819.**

**BEFORE** { **Hon. BUSHROD WASHINGTON, Associate Justice of the**  
**Hon. RICHARD PETERS, District Judge.** **Supreme Court.**

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**CRAIG vs. BROWN.**

Action on a bill of exchange, drawn by the defendant, in favour of the plaintiff, at New-Orleans, on J. B. of Philadelphia, in 1807. The declaration contained a special count, on a new promise made by the defendant in 1809, to pay the bill if he should ever be able, with an averment of his ability. To this count the defendant pleaded the Statute of Limitations.

The Act of the Assembly of Pennsylvania, passed in 1815, authorizing the notarial acts of notaries public to be given in evidence, is not obligatory in the Circuit Court of the United States.

Where a promise has been made to a person, who was not the agent of B., and had no authority from him to pay a debt due to B., in a different manner from the original contract, and B. is not present, and does not accept the promise, B. cannot afterwards institute a suit upon the engagement. Where a promise is made to pay a debt when able, and the creditor does not wait, but proceeds immediately in the original obligation, before the defendant had ability to pay, he cannot afterwards resort to the promise of payment when able.

**THIS** was an action on a bill of exchange, dated 11th July 1807, drawn at New-Orleans, on James Brown & Co. of Phi-

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Philadelphia, at sixty days after sight, by the defendant, Elijah Brown, in favour of the plaintiff. The declaration contains the usual money counts, and also a count, stating a new promise, made by the defendant to the plaintiff in 1809, to pay this bill, if he should ever be able to do so; with an averment that he was able to pay. Pleas, to all the counts, *non assumpsit*, and to the count on the bill of exchange, *non assumpsit* within six years. By a written agreement, made between the counsel on each side, a replication to the plea of the Act of Limitations was dispensed with; and the plaintiff was permitted to give any legal evidence, to prove a new promise, or the inapplicability of the Statute of Limitations.

Shoemaker, for the plaintiff, in his opening, gave in evidence the bill of exchange, and offered to read the protest; which was objected to by the defendant's counsel, on the ground that this is an inland bill, which requires no protest; and that, therefore, the protest offered in evidence was inadmissible. The plaintiff's counsel acquiesced in this objection; and relied merely on the Act of Assembly of this state, passed in 1815, authorizing the acts of notaries public and other officers to be given in evidence. But the Court was of opinion, that this law did not apply to, nor is it obligatory on, this Court. As to the question, whether this is an inland bill or not, the Court was not asked to give an opinion, and gave none.

No proof was offered by the plaintiff, that this bill was presented to the drawee for acceptance, or that notice of its non-acceptance or non-payment was given to the drawer.

The plaintiff further stated, in his opening, that a suit was commenced on this bill, in November 1813; and a nonsuit was suffered in October 1815; and on the next day this suit was instituted.

It was proved by a witness, that in the year 1809, the defendant, speaking of this bill, and of others which he had drawn in the year 1807, on James Brown & Co., and which had been dishonoured, said; that he was not then able to pay them; but



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that he would do so, if he ever got able. The person to whom this declaration was made, was not the agent of the plaintiff; she had no authority to make any negotiation whatever, with the defendant, respecting this bill. Another witness stated, that the defendant was, in his opinion, able to pay this bill in the year 1816, and afterwards.

The plaintiff having closed his evidence here, the defendant's counsel, Joseph R. Ingersoll, and Chauncey, moved for a nonsuit upon the following grounds—1. That no proof having been given, that this bill was at any time presented for acceptance and payment, and notice of its dishonour given to the defendant, the plaintiff cannot recover on the count on the bill. Neither can he succeed on the count upon the new promise; because, 1. The defendant was no party to it, nor did he ever acquiesce in it; but on the contrary, his first suit was in derogation of it. 2. The suit was brought before the time when the defendant's ability to pay is proved. 3. That there was no existing debt as the consideration of the new promise, on account of the want of presentation of the bill and notice.

On the other side, it was contended, that the drawing of the bill created a moral obligation to pay it, which is a sufficient consideration; and that the subsequent promise amounts to a waiver of the defendant's right, to insist upon proof of a presentation of the bill, and of notice; and is also an answer to the Statute of Limitations;—that a person for whose benefit a promise is made to a third person, may sue on that promise. He cited Selw. N. P. 51, 52. 1 Bac. Ab. 271. 15. Vin. Ab. 119. pl. 6. 2 T. Rep. 718. 2 Campb. 188. 5 Johns. 248. 385.

WASHINGTON, Justice, delivered the opinion of the Court. If the plaintiff give any evidence, from which the jury may imply facts sufficient to support the action, the Court will never take the case from the jury by directing a nonsuit. But if, after giving the fullest weight to the evidence, the plaintiff is not entitled, in point of law, to a verdict, it would be a mere

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waste of time to proceed further in the trial ; and it is then proper to direct the plaintiff to be called.

It is impossible for the plaintiff to succeed upon the count on the bill of exchange, because of the total absence of proof, that it was presented for acceptance; or that if it were presented, notice of its dishonour was at any time given to the defendant.

It is contended, that the subsequent promise of the defendant amounted to an acknowledgment of both these facts, and to a waiver of any advantage which might be taken on account of a want of evidence to prove them. But we take the law to be perfectly clear, that to produce these consequences, the promise must be a valid one; must be clearly made out in proof; must be absolute; and should appear to have been made upon a full knowledge of the facts, which the promise is supposed impliedly to admit.

In this case, the promise was not made to the plaintiff, nor to his agent;—it was conditional, and might therefore be consistent with a denial of those facts; and there is no evidence whatever, that the facts were known to the defendant; particularly, that of the non-presentation of the bill. The plaintiff's case, therefore, is not relieved from the objections to his recovery on the first count, by his subsequent promise or declaration.

As to the count upon the promise, as constituting a new contract, the objection that the plaintiff was no party to it, is fatal. If it was valid to bind the defendant to pay whatever he should be able, it must have been also obligatory upon the plaintiff, to wait until that event should take place. But this was clearly not so. The declaration was not made to the plaintiff, nor yet to any person authorized by him to assent to it, or, in any respect, to bind him. It was never afterward ratified by the plaintiff, in word or in deed. So far from it, he afforded record proof of his dissent, by instituting his suit at least two years before it is pretended that the defendant was able to pay; and grounding it, not on the new promise, but upon the origi-

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and cause of action. He cannot now be permitted to avail himself of a promise which he has once refused his assent to, because it will now serve his purpose. •

The plaintiff agreed to be called.

*Nonsuit.*

Shoemaker, for the plaintiff.

Chauncey, and Joseph. R. Ingersoll, for the defendant.

## THE UNITED STATES vs. ASTLEY AND BROOKS.

B. & L., partners, being indebted to the United States for duties, B. executed a bond for the debt, in his separate name. B. & L. afterwards made a voluntary assignment of their property to the defendants, for the use of their creditors; and B. assigned his estate, for the use of his separate creditors. Before the bond was given, B. & L. authorized, in writing, each to execute custom-house bonds for duties,—each one of the partners agreeing to be bound for the payment of the bonds, as if executed by both. This action was instituted, (*indebitatus assumpsit*,) against the assignees of B. & L., to recover from them the amount of the bond given by B. to the United States, out of the partnership effects of B. and L.

The bond is not evidence of a debt due by B. & L., because not signed by them; nor of a debt due by L., because not signed by him.

One partner cannot, by deed, bind his co-partner; unless executed in his presence, and by his consent.

Although B. & L. were bound, on the importation of the goods, for the duties on the goods, yet the bond of B. is not admissible in evidence, to prove the amount of those duties; because the bond, although given by one partner, extinguished the debt for which it was given, and made it the separate debt of B.

THIS was an action of *indebitatus assumpsit*, for money had and received by the defendants, to the use of the United States, brought in the District Court. Upon the general issue, the plaintiffs offered in evidence, that Samuel F. Bradford, and John Inskeep, were indebted to the plaintiffs, in the sum of 6,828 dollars, being the amount of four several bonds, for duties on the importation of goods into the United States; which bonds had been put in suit against the said Bradford, and Moses Thomas, his surety, on which judgments were regularly obtained, but on which no executions had issued; and proposed further to prove, that the said Samuel F. Bradford & John Inskeep, trading under the firm of Bradford & Inskeep, not hav-

ing sufficient property to pay all their debts, on the 7th of January 1815, made a voluntary assignment of all their estate and effects to the defendants, in trust for their creditors; and that the said S. F. Bradford and his wife, on the same day and year, made another assignment of all his separate estate and effects to the defendants, in trust, for the benefit of his separate and individual creditors; and that the defendants, as assignees, had sufficient assets of the estate and effects of Bradford & Inskoop, to satisfy the debt due to the United States on said bonds; and that, prior to instituting the said action, due notice thereof was given to the defendants, who refused to pay the said debt: and the plaintiffs offered in evidence, the said four bonds, together with a certain power of attorney, bearing date the 7th of July 1808, the said bonds having been executed by the said Bradford and Moses Thomas; and the said power of attorney having been executed by the said John Inskoop & Samuel F. Bradford. The admission of these bonds in evidence, being objected to by the defendants, the Court decided that they were not competent evidence, and overruled and rejected them; and the jury, under the direction of the Judge, found a verdict for the defendants—to which decision and direction, the plaintiffs filed a bill of exceptions, stating all the above matter.

Judgment upon the above verdict, having been entered for the defendants, the case was brought by the plaintiffs into this Court, by writ of error.

The power of attorney referred to in the above bill of exceptions, bears date prior to the four bonds, and is executed by Samuel F. Bradford & John Inskoop, and is in the following words: "Know all men, &c. that we the subscribers, &c. trading under the firm of Bradford & Inskoop, mutually authorize and empower each other, from time to time, in our several and respective names, to sign, seal, and deliver bonds at the custom-house; hereby agreeing, jointly and severally, to be bound for the payment of all such bonds, with like remedies and effects,

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as if we had severally signed, sealed, and delivered the same." The bonds, for the amount of which this suit was brought, are executed by Samuel F. Bradford, in his own name only, and by Moses Thomas.

*WASHINGTON, Justice*, delivered the opinion of the Court. The case upon which this action is founded, is stated in the bill of exceptions, and is as follows: Bradford & Inskip, being indebted to the United States in a certain sum for duties, four several bonds, for the amount of the same, were executed by Samuel Bradford, one of the partners, in his individual and separate capacity, and by Moses Thomas, his surety; and being unable to pay all their debts, Bradford & Inskip made an assignment of all their estate and effects to the defendants, for the benefit of their creditors; from which estate, the defendants received a sufficiency to satisfy the said bonds; but refused, upon demand made by the plaintiffs, to pay the same; and the only question for the consideration of this Court is, whether the Court below ought to have admitted these bonds to be given in evidence, to prove a debt due by Bradford & Inskip, or by Samuel F. Bradford, to the United States?

The objection made to the admission of this evidence is, that they are incompetent to prove a debt due by Bradford & Inskip, because they were not executed by them; and consequently, the defendants cannot be charged as receivers of money belonging to that firm, to the use of the United States. If, in point of law, the premises be correct, the conclusion unquestionably is so. The question then is, whether these were the bonds of Bradford & Inskip? The affirmative is contended for, by the counsel for the United States, upon the following grounds: 1st. That one partner has a general authority to bind his co-partner by deed; and if not so, then, 2d. Samuel F. Bradford was authorized to bind his co-partner, by virtue of the power of attorney mentioned in the bill of exceptions.

The first ground cannot for a moment be maintained; and

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even the counsel, who stated it, did not appear to have much confidence in it. There is not, it is confidently believed, a solitary case to be found, which supports the doctrine, that one partner can, by deed, impose a charge upon his co-partner; and the authorities to the contrary are numerous and positive: *Harrison vs. Jackson*, 7 Term Rep. 307. *Greer vs. Beals*, 8 Caines, 254. 4 Bac. 608. *Tit. Merchant*.

It is true, that one partner may release a partnership debt, so as to bind his co-partner; but this proceeds upon a general and well established principle of law, that a release by one joint creditor bars the other;—the release is a satisfaction in law, and is equivalent to a satisfaction in deed. *Ruddock's Case*. 6 Co. Rep. 25. 2 Rolls. Ab. 411.

2. That one partner may, by a power of attorney, authorize the other to execute a deed in his name, or in the name of the co-partnership, is not to be doubted. Indeed, without such a power, one partner may bind the co-partnership by a deed executed in his own name, and in that of his partner, if it be done in his presence, or by his authority. 4 Term Rep. *Bell vs. Dunsterville*. 3 Vez. Jun. 578.

In this case, it must be admitted, that Bradford was fully authorized, by the power of attorney, to bind his partner, by placing his signature and seal to the bonds in question; and if he had done so, the case would have admitted of no doubt. But he has not thought proper to execute the bonds, either in the name of the co-partnership, or in the separate names of his partner and himself; and the bonds are therefore the separate bonds of Samuel F. Bradford; so much so as if the power to bind his partner had not been given.

It was insisted, indeed, though somewhat indirectly, that the power of attorney contained an agreement, by each partner, to be bound by any bond which the other might execute in his own name. This is by no means the fair construction of the instrument. It authorizes each partner to execute custom-house bonds, not in his own name, which would have been use-

less and absurd, but in their several and respective names; that is, in the names of Samuel F. Bradford and John Inskip, and not in the name of either. The agreement to be bound by bonds so executed, was certainly an unnecessary stipulation; but, nevertheless, the insertion of it cannot control the plain construction of the words which grant the authority. Neither are we prepared to admit, that an agreement between Bradford and Inskip, that each would be bound to pay bonds executed by the other, alone, would make such bonds the deeds of the party who did not execute the bonds. This, however, is a point not necessary to be decided in this case.

But it is contended, that, notwithstanding these bonds, Bradford and Inskip were bound, as importers of the goods upon which the duties arose, to pay the same to the United States; and that the bonds ought to have been suffered to go to the jury, as evidence of the amount of the debt for which they were so liable. To this argument, there is this conclusive answer,—that the bonds, being given by one partner for a partnership debt, extinguished the simple contract debt, due by the co-partners, as importers, and made it the debt of Bradford alone, who executed them. We entirely concur in the opinion of the Supreme Court of New-York, in the case of *Tom v. Goodrich*, 2 Johns. 213. The reason upon which the doctrine is founded, is obvious. The bond is clearly obligatory upon the partner who executed it; and is therefore an extinguishment of the simple contract debt as to him. A joint action, therefore, to recover on the original debt, could not be supported against both partners. Neither could an action be maintained against the partner who did not execute the bond, because he has a right to insist that his partner should be joined with him in the action; of which right the creditor and the other partner cannot, without his consent, deprive him. It is precisely like the case of a release, which, if given to one joint debtor, discharges both. A bond, given for a simple contract debt, operates as a release of that debt, and creates another of a superior



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dignity, which can be enforced only against the person who executed the bond.

The case of the United States vs. Lyman, 1 Mason's Rep. 429, does not contradict this doctrine, even as applied to custom-house bonds; and we subscribe entirely to the decision made in that case. There, the bond for the duties was given by a purchaser from the importer, after the importation was complete, and had fixed the importer with the debt. The bond, therefore, was given by a stranger to the original contract; and it is a clear principle of law, that a simple contract debt is not extinguished by a higher security, afterwards given by a third person; unless where it is done in pursuance of an agreement made at the time when the original debt was created.

It is true, that the learned Judge intimates an opinion, that a bond given by the importer himself, would not extinguish the original debt; but he gives no positive opinion upon the point; and, noticing the case of Tom vs. Goodrich, he observes merely, that the doctrine it establishes may admit of some doubt; but that in that case, it was unnecessary to consider it, as the case he had to decide was not that of a partnership. And he concludes, by considering the bond given by Lovejoy, only as the security of a third person, for the proper debt of the importer, which would not, *per se*, extinguish it; and most unquestionably it was no more than a collateral security.

Again, it is contended on the part of the United States, that, although this bond might not be proper evidence of a debt due by Bradford & Inakeep to the United States, it clearly constituted a debt of Samuel F. Bradford; out of whose separate estate, in the hands of the defendants, his trustees, the United States were entitled to be paid the amount of these bonds, in preference of Bradford's other creditors.

To this argument there are two objections. The first is, that the bonds, as the bonds of Bradford alone, were merged in the judgment, stated in the bill of exceptions to have been obtained

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*The United States vs. Ashley et al.*

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against him; and therefore, they had no legal existence for any purpose whatever. And secondly, the evidence so offered, did not correspond with the case stated by the plaintiffs as constituting the foundation of their action; the former being the evidence of a debt due by Bradford alone; and the latter, that of a claim of a partnership debt due by Bradford & Inskip; and the defendants being sued as receivers of the joint funds of the co-partners, debtors of the United States, it was necessary for the United States to prove, not only that they were such receivers, but also, that the debt chargeable upon those funds, in the hands of the defendants, was due from the co-partners.

Upon the whole, we are of opinion, that the judgment of the District Court ought to be affirmed.

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 The United States vs. Wiltberger.
 

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## THE UNITED STATES vs. PETER WILTBERGER.

Indictment for manslaughter, committed by the master of an American merchant ship, on a seaman, in the river off Wampoa in China.

A man may oppose force to force in defence of himself, his family, or property, against one who manifestly endeavours, by surprise or violence, to commit a felony. The intent of the person resisted, must be to commit a felony, or the killing will not be justified.

No words or gestures, however irritating, will justify the killing; although they may reduce the offence from murder to manslaughter.

The intent to commit the felony must be *apparent*—the damage must be *imminent*, and the resistance used *necessary* to avert the damage.

The prosecutor must prove, that the blows caused the death; but if he proves that the blows were given by a dangerous weapon—were followed by insensibility or other alarming symptoms, and soon afterwards by death; this is sufficient to impose it on the accused, to show that the death was occasioned by some other cause.

*Quere*, Whether this offence, which was committed on a river, was within the jurisdiction of the Circuit Court of the United States, according to the provisions of the Act of Congress.

**THIS** was an indictment against the defendant, for the manslaughter of one Peters, a mariner on board the ship Benjamin Rush, committed by the defendant, the master of the said ship.

The offence was charged to have been committed on board of this vessel, an American bottom, on the high seas. The evidence was, that at the time the offence is charged to have been committed, the ship lay at anchor in the river Tigris, off Wampoa, some yards from the shore, in four and a half fathom water, fourteen miles below the city of Canton, and thirty-five miles above the mouth of the river;—that at this place, and higher up the river, the tide ebbs and flows; and in very dry seasons, the water is salt; but at other times it is fresh, and

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The United States *vs.* Wildberger.

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that vessels take in water there, for their return voyages—that there are Chinese forts at the mouth of the river, on each side, which entirely command it; the river not exceeding half a mile in width at the mouth, and retaining the same width at Wampoa;—that a Chinese custom-house officer is taken on board at one of these forts, by foreign vessels, to prevent smuggling.

An objection was made by the defendant's counsel, to the jurisdiction of the Court; and this constituted the only point of law which was much controverted. The material parts of the evidence relating to the offence, as charged, are stated in the charge.

In support of the objection to the jurisdiction, it was contended, that the question is not as to the extent of the criminal and civil jurisdiction of the admiralty; but whether, under the laws of the United States, manslaughter is cognizable in the Courts of the United States, unless it is committed within some place under the exclusive jurisdiction of the United States, or on the *high seas*; and whether a foreign river or harbour can be considered as the high sea?

The 8th section of the first article of the Constitution, authorizes Congress to define and punish piracies and felonies committed on the high seas; and the 2d section of the third article declares, that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. It is admitted, that under this latter grant, Congress might have vested, in any of the Courts of the United States, the cognizance of offences committed in any place to which the admiralty and maritime jurisdiction rightfully extends, even although that should be proved to include rivers, ports, and havens. Accordingly, murder and robbery committed in any river, &c., out of the jurisdiction of any particular state of the United States, is made punishable by the 8th section of the Act upon which this indictment is founded. But the offence of manslaughter is confined, by the 12th section, to the *high seas*; from which it is plainly to be inferred, that Congress was attentive to the distinction,

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The United States vs. Wiltberger.

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and intended to make it, between the high or main sea, and waters within the bodies of counties, or within the mouths of rivers.

It was contended, that the term high sea, means the ocean or main sea; and the coast thereof below the low water mark, the space between that and the high water mark, or the sea-coast, being the *divisum inferius* spoken of in the books, and not the same space in arms of the sea, rivers, &c. Cases cited, Co. Lit. 260. 5 Rep. 107. Mass. Rep. 152. 2 Gall. 404. 427. 429. 1 Gall. 627. 3 T. Rep. 315. 3 Wheat. 371. 2 Brow. C. & A. Law. 466. 474. 460. 1 Brow. 422. Sir Leon. Jenkins, 76-7. Heb. De Jure Maris, ch. 4. 2 East's C. L. 803-4. 4 Blac. Com. 268. Sea Laws, 432.

It was contended, that the grant of jurisdiction to the Courts of the United States, to punish offences of this kind, committed in foreign rivers and havens, was unnecessary, as they were clearly cognizable by the tribunals of the country where they were committed, though perpetrated by foreigners, in foreign vessels; those places being parts of the public domain of that nation. Vatt. B. 1. c. 20. s. 245. c. 22. s. 278. c. 23. s. 295. B. 2. c. 7. s. 84.

It was contended, by the District Attorney, that the place where this offence was committed, is within the admiralty and maritime jurisdiction, as asserted and exercised, invariably, on the continent of Europe, and always in England, until after the Statute of Richard 2; seconded by the prohibitions and usurpations of the Common Law Courts. The Constitution vests in the judicial department of the government, cognizance of all cases of admiralty and maritime jurisdiction; and thereby clearly refers to that jurisdiction, as generally understood and exercised amongst the nations of Europe; and not to the exercise of it at the period when the Constitution was framed. Of this general nature was the jurisdiction of the colonial Courts of Admiralty, at the period of the Revolution. This power, then, having been conferred on the legislature, it is not to be believ-

ed, that Congress could have intended, by the expression of high seas, to give this, and many other offences enumerated in this Act, committed on runs and arms of the sea; either punishable altogether, or subject to the will or caprice of a foreign government, to punish them or not, as such government might think proper. There is no civilized nation, with which we are acquainted, where jurisdiction over offences committed on board of its own vessels, in foreign ports, would not be exercised; and it is incredible, that Congress intended to place the tribunals of the United States, in this respect, in a different predicament.

That Congress did not so intend, is obvious from the whole tenor of this law; where we find the *high seas*, the *high sea*, and *sea*, used promiscuously, and as synonymous throughout the different sections. This is remarkable in the 12th section, in reference to offences, between which scarcely a shade of difference can be discovered.

He contended, that the high seas include not only the coasts of the sea, but the arms of the sea, runs, creeks, and harbours below the low water mark. Cases cited, 1 Gall. 627. 4 Dall. M'Gill's case. Barr. Rep. 266. 2 Brow. C. & A. Law, 457, 464, 8, 403-4, 486-7, 484. 2 Sir L. Jenk. 708, 745. 1 Hale, C. L. 424.<sup>o</sup> Com. Dig. Tit. Adm. 2. 4 Inst. 136-7. 5 Co. Constable's case. 2 Gall. 470.

Upon the merits, it was insisted, by the counsel for the defendant, 1st, that the blows, inflicted upon the deceased by the defendant, were not the cause of his death; and that the evidence clearly established, that it was produced by a mortification of the stomach, caused by the improper use of an ardent spirit, distilled in China, and known by the name of Samichoo.

2d. That, if the death was caused by the blows, still the homicide was justifiable, on account of the menacing attitude of the deceased, and the combination which had been formed amongst the crew, to resist the master, in case he should strike any one of them.

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The United States vs. Wilthergar.

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WASHINGTON, Justice, charged the jury. The evidence may be arranged under two heads,—1st, that which relates to the death of Peters; and 2d, to the cause of it.

1. *Coles*, the witness most relied upon by the defendant's counsel, to justify his conduct upon this unfortunate occasion, has testified, that the deceased, being aloft, was called down by the defendant, in consequence of some expressions of discontent at being sent up, which were not distinctly heard by the defendant. As he went aft to the quarter deck, where the defendant was standing, he pulled off his jacket, rolled up the sleeves of his shirt, and approached the defendant with folded arms. Being asked by the defendant what he was grumbling at, he complained of being unwell, and was ordered by the defendant to go below, accompanied with an observation, that he knew that no person on board, in that situation, was required to do duty. The defendant then turned his back upon Peters, and walked to and fro on the quarter deck. Peters still continued on the deck; altered the position of his arms; and, with his fists clenched, and in a menacing attitude, impertinently addressed the defendant, observing, "you called me down, with intention, I suppose, to flog me;—I wish to know if you meant to do it or not?"—To which the defendant answered, "if you want flogging, I will flog you;" and immediately struck the deceased with his fist. About this time, *Clark*, another seaman, came shaft the windlass, and then Peters sprang toward the defendant; but whether he struck the defendant or not, the witness could not testify. The defendant then picked up a stave, (which all the witnesses say was of white oak and large,) and struck Peters with it on the head. Immediately after this, a conflict took place between the defendant and *Clark*, the latter having grasped the right arm of the defendant with one of his hands, and his collar with the other. *Clark* was ordered to go forward, which he did; but immediately afterwards returned; and the order being repeated, he refused, with insolent language, to do so, which was followed by a blow, inflicted on

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The United States vs. Wiltberger.

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him by the defendant, with the stave, which Clark returned with another stave, and prostrated the defendant; Clark then went forward, and here the affray ended.

As to the throwing off his jacket, and rolling up his sleeves, by Peters, Coles is supported by two other witnesses. Some evidence was given by another witness, as to the menacing attitude of Peters, after the defendant told him to go below; and two other witnesses have testified, that the defendant struck Peters with his fist, not in the first instance, but after he had been stricken with the stave, and as he fell. The advance of Clark at the time mentioned by Coles;—the springing of Peters towards the defendant, and the seizing of the defendant by Clark, are facts unsupported by any other witness, and are in effect contradicted by them. Coles saw but one blow with the stave. The other witnesses speak of two, and three; and all agree, that, from the time that Peters was knocked down, he continued speechless, and senseless, till his death; which happened about eighteen hours afterwards.

Upon this evidence, the first question is, whether this homicide, (if attributable to the defendant,) amounted to the crime of manslaughter?

Manslaughter is the unlawful killing of another, without malice, either express or implied. It differs from murder in the important particular of the absence of malice; as where it happens in a sudden heat, when passion has obtained the dominion over reason and the gentler feelings of the heart. From a respect to human infirmities, our law, in such a case, mitigates the offence of murder into manslaughter, as well as the punishment. Still, however, this offence is unlawful; the law not permitting any man to avenge his own wrongs, unless in a case of great emergency, by the death of the supposed offender.

The present case is one which the defendant's counsel have contended is justified by law;—justified, they say, upon the ground of self-defence.



As to this, the law is, that a man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavours, by surprise, or violence, to commit a felony, as murder, robbery, or the like.

In this definition of justifiable homicide, the following particulars are to be attended to. The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words—no gestures, however insulting and irritating—not even on assault, will afford such justification; although it may be sufficient to reduce the offence from murder to manslaughter. In the next place, the intent to commit a felony must be *apparent*, which will be sufficient; although it should afterwards turn out that the real intention was to be criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like; and, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used, necessary to avert it.

Nailor's case is a strong exemplification of the law, as here stated. The homicide was decided to be manslaughter, and not murder; because it took place in a sudden affray, and in the heat of passion. But it was not considered to be justifiable; because the apparent intent of the deed, was merely to rescue the father, and by no means to affect the life of the deceased; and there was no such danger as could render the use of the weapon, which caused the death, necessary.

The case of the adulterer, killed by the offended husband, at the moment when he discovers his dishonour, is another, and a very strong example of the rule; although no provocation can be more difficult to bear with, yet the law does not reduce the offence below that of manslaughter.

It is for you, gentlemen of the jury, to say, upon the whole of the evidence given in this case, whether there was any intention in the deed, apparent, or otherwise, to take the life of

## The United States vs. Wiltberger.

the defendant, or to commit any known felony; and whether there existed any danger which rendered it necessary for the defendant to use the weapon which he did?

It is contended by the defendant's counsel, that the combination amongst the seamen to resist any attempt of the defendant to strike or to correct them, affords a ground of justification, which distinguishes this from ordinary cases of a simple assault, happening on land.

This distinction is inadmissible, in the present case, for the following reasons:—

1. There is no evidence that this combination, if it was ever formed, was at any time communicated to the defendant.

2. The circumstances of the moment, afforded no indication that mutiny or resistance of any kind was intended, much less "that it was imminent;" as there was but one seaman on the deck, besides Peters, who appeared to take any part or interest in the affray; and the appearance of that seaman, was subsequent to the termination of the conflict between the defendant and Peters.

Some indulgence, we admit, may be claimed by the master of a vessel, beyond what the law extends to a person on shore. He may not be required to retreat, when assaulted by a seaman; so as thereby to indicate fear, and to diminish his authority, so essential to the due subordination of his crew. In like manner, slighter evidence of danger may be admitted in his justification, than in that of a person on land. Still, it must be shown, that there was a necessity for what he did, to prevent an apparent intention to commit a felony. Even an officer of justice, who has a warrant commanding him to arrest a person, must prove resistance; and that the act which occasioned the death of the party to be arrested, was necessary.

3. The next, and by far the most important question in this case, is, whether the blows inflicted on the deceased by the defendant, were the cause of his death?

It has been truly stated by the defendant's counsel, that the

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proof of this fact lies upon the prosecutor. He has accordingly laid before you evidence, that Peters was, by repeated blows, inflicted by a dangerous weapon on the head, knocked down; and that from that time, until his death, which took place in about eighteen hours afterwards, he continued speechless, insensible, and motionless, with no other sign of life than a difficult respiration.

It is unnecessary for the prosecutor to prove more, to establish the fact in controversy. The law presumes, that the death was occasioned by the alleged cause; unless the contrary can be clearly established to your satisfaction, by proving, either that this was not the cause of the death, or by showing some other cause which was sufficient to produce that effect. It will not do to assign some other possible or probable cause, unsupported by evidence of at least equal weight with that assigned in support of the prosecution.

To prove that the blows inflicted on the deceased, by the defendant, did not occasion his death, the defendant relies upon the testimony of many respectable witnesses, who examined the body soon after the death took place; who have declared, that there were no appearances of violence having been committed on any part of it except the head, and that the skull was free from any appearance of fracture.

To prove that the death is to be attributed to another cause, evidence is given you by the same witnesses, that the body was opened by a surgeon, and that the stomach evinced a high state of inflammation, if not of gangrene. It has also been proved, that Peters had, on different occasions, and even recently before the wounds inflicted by the defendant, drank of a species of ardent spirits, distilled in China, called by the natives samcheo; and that a liquid which resembled samchoo in smell, was discharged from the mouth and nostrils of the body when it was examined, which became more copious by pressure on the stomach. Many instances of the deleterious effects of this liquor, have been stated by the witnesses; and the

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physicians who have been examined, have given it as their opinion, that this liquor, taken into a stomach diseased, or predisposed to inflammation, might in a short time increase the state of inflammation, as to produce mortification and sudden death.

Upon this evidence, you must decide to which of these causes the death of Peters is to be attributed; and if you should doubt, let that doubt be cast into the scale of innocence.

As to the question of jurisdiction, there will be no necessity for the Court to give an opinion upon it, if you should think that the defendant is not guilty of the offence of manslaughter. Should your opinion be unfavourable to the defendant, you will find him guilty, subject to the opinion of the Court upon the facts of the case.

The jury found the defendant guilty, subject to the opinion of the Court upon a case stated, upon which the question of jurisdiction was carried to the Supreme Court.<sup>a</sup>

Charles J. Ingersoll, District Attorney, for the prosecution.  
J. Sergeant, and Joseph R. Ingersoll, for the defendant.

<sup>a</sup> See 5 Wheaton, 78.

THE UNITED STATES vs. SMITH & COOMBS.

The master of a vessel has an absolute authority on board the vessel under his command, and his lawful orders must be obeyed. He may inflict moderate correction for disobedience, and impertinent language or behaviour. The seaman may endeavour to escape from it; and if he is exposed, and is otherwise exposed to a repetition of such treatment, he may resist for the mere purpose of protecting himself from injury. If the master use an unlawful weapon, or the seaman is exposed to danger of his life, or limbs, he may resort to any necessary species of defence to avoid this danger.

If the master strikes the seaman, and is seized by him, and is so firmly held, as that he cannot extricate himself, the seaman is guilty of confining the captain.

*Quere.* What is making a revolt on board a ship?

**INDICTMENT.** The first count was for confining the captain. 2. For endeavouring to make a revolt.

*WASHINGTON, Justice,* charged the jury. As something has been said, by the counsel on each side, respecting the authority of the master of a vessel to correct his seamen, and the duty of submission by the latter, it may not, perhaps, be time misemployed, to make some observations upon these subjects, although not necessarily involved in the questions which arise under the present prosecution.

The master has an absolute authority on board of his ship; and his orders, if not unlawful, are, and must be, imperative.—Submission is amongst the first duties of the seamen; and their deportment to the master ought to be respectful. He is justified in inflicting moderate correction on the mariners, for disobedience of orders, and for impertinent language and behaviour. Although it would be, in general, more dignified and more pru-

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The United States vs. Smith et al.

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dent, to avoid inflicting personal chastisement on a seaman for offensive language, yet the law does not condemn him for doing so; it is an indulgence to human infirmity, rather than a justification. The seaman, in such a predicament, may endeavour to escape from it; and if pursued, or if he is otherwise exposed to a repetition of such treatment, he may lawfully resist, in such manner as to protect himself against injury. If the master make use of an unlawful weapon, or the seaman is otherwise exposed to apparent danger of life or limb, he may lawfully resort to any species of defence necessary to avert the danger. In the case of the United States vs Sharp, 1 Peters, 118, this doctrine was fully explained.

Having made these general observations, we proceed to the consideration of the first count in the indictment; which is, for confining the master.

The evidence on the part of the prosecution is, that after the master had struck at Smith, with a rope of dangerous size, which Smith laid hold of in order to escape the blow, the master struck him with his fist, which Smith returned; and having seized each other, they fell on the deck; and the master, having the ascendancy, placed his knee on the breast of Smith; and, in that situation, mutual blows were exchanged, (Smith having hold of the master's collar,) until Boyd, another of the seamen, desired the master not to strike Smith again; upon which he quitted Smith, and ordered all the seamen, who, to the number of eight or ten, had come aft on the quarter deck, to go forward. The witnesses further prove, that, whilst Smith was down, he called to his comrades more than once, and asked if they would see him so treated; that they were ordered by the master to go forward, which they refused to do, until the master had called for his cutlass, and was in a situation to enforce his order. . .

The defendants' witnesses deny that Smith struck the master, or laid hold of him, so as to confine him; some of them deny, also, that Smith called for the aid of his comrades, or that

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they were ordered by the master to go forward, until he had risen from the deck and called for his cutlass; when they obeyed.

Upon this evidence, it is for you to say, whether the captain was at any time confined by Smith;—that Smith, after he was seized by the master, and until he was released, was himself confined, is certain. Nevertheless, if the captain's situation was forced upon him by Smith;—if he was so firmly held by Smith that he could not extricate himself, then the defendant is guilty under this count; because, it has repeatedly been decided in this Court, that if the master be placed under restraint by his seamen, or by any one of them, for any space of time, however short, whether it be by manual force, or by menace and intimidation, this is, in construction of law, a confinement. The U. S. vs. Sharp, U. S. vs. Bladen, U. S. vs. Smith.

If, on the other hand, the master was not so restrained, the insolence of Smith, his return of the captain's blows, however culpable such conduct would render him, and his resistance of the blows he received, would not amount to this offence.

One of the witnesses stated, that he and the captain thought it prudent, for some nights after this affray, to keep watch in the cabin, and to be armed. If this was so, and you should be of opinion, that the conduct of the defendants and their associates rendered that measure prudent; and if also, the captain, in consequence of any threatened danger from the seamen, was prevented from the free exercise of all his privileges in every part of the ship, then these circumstances would amount to a constructive confinement;—otherwise not. But unless this, in your opinion, was the fact, there is no evidence whatever to convict Coombs upon this count, as he had no personal conflict with the master, which can be construed into a confinement of him.

As to the other count, for endeavouring to make a revolt.—

What constitutes a revolt, has never been decided by this Court. On the contrary, we have always recommended it to

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the jury, to acquit the accused on counts for making, or endeavouring to make, a revolt.

But a most respectable and learned Judge of the Supreme Court, (Wm. J. Mason's Rep. 147,) has defined it to be an endeavour to excite the crew to overthrow the lawful authority of the master and officers of the ship.

Wishing to have this point decided by the Supreme Court, we shall request the jury, in case they should be of opinion that the defendants are guilty of endeavouring to make a revolt, according to this definition, to find them guilty, subject to the opinion of the Court upon the facts of the case.

*The jury found the defendants not guilty.*



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Bleecker vs. Bond.

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## BLEECKER vs. BOND.

Action of covenant, upon an agreement under seal, entered into in 1804, in which the defendant bound himself to pay to the plaintiff two notes of 1,250 dollars each, and an unliquidated demand, when it should be liquidated, forthwith; after the defendant should obtain, or be in a legal capacity to obtain the lawful possession of the Georgia lands conveyed by him to E. G. The declaration averred, that on, and ever since the 1st of May 1806, the defendant was in the legal capacity to obtain, &c.; and, on this, issue was joined.

Until the defendant was in the legal capacity to obtain possession of the lands, the plaintiff's claim was suspended; and, as soon as the capacity existed, the plaintiff's right accrued; although the defendant did not choose to obtain, or endeavour to obtain the possession.

The mortgages of the defendant, as the agent of the defendant, having received from the United States, compensation for the lands conveyed to the defendant, by E. G.; and he having conveyed the land to the United States, they being part of the Yazoo lands, the defendant is estopped thereby, from denying his legal capacity to obtain possession of the lands.

The deposition of a witness, living out of the state, and more than one hundred miles from the place where the Court is held, cannot be read, unless taken under a commission.

The certificate of the Register of the Treasury Department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the Secretary of the Treasury, under the seal of that department, that he is the Register, is not evidence. It must appear, not only that the officer who gives the certificate, has the custody of the papers, but that he is authorized by law to certify them; and the Register is not so authorized—a sworn copy should have been produced.

THIS was an action of covenant upon articles of agreement, bearing date the 15th November 1804, entered into between these parties, whereby the defendant covenanted, amongst other things, to repay to Bleecker the amount of two notes, for 1250

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*Meeker vs. Bond.*

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dollars each, and the amount of an unliquidated account, when the same should be liquidated, forthwith, after Bond should obtain, or be in a legal capacity to obtain the lawful possession of about 700,000 acres of land in Georgia, which had been conveyed to Bond by Edward Gould. The declaration avers, that the defendant, on the 1st of May 1806, before, and ever since, was in a legal capacity to obtain the lawful possession of the above lands; on which this issue was joined. The defendant also plead generally covenants performed.

The plaintiff gave in evidence the Act of the Georgia legislature, of the 7th January 1796; the grant by the governor to the Georgia Company; the rescinding law of 1796; and a succession of conveyances, from the Georgia Company, of the land mentioned in the articles of agreement, to the defendant; the conveyance to Edward Gould in April 1798; and of Gould to Bond in 1802:—also a conveyance from Bond to Walter Simms, in 1803. It was also proved, that, on the 8th of November 1814, Simms released all right and title in those lands to the United States; and in other respects conformed to the requisitions of the Act of Congress, passed the 31st of March 1814, and received the compensation allowed by that law, in certificates of stock.

By an award, made in a suit brought by the defendant against Simms, it appeared, that the deed from the former to the latter, though absolute in form, was intended as a mortgage, to secure the payment of a certain unliquidated claim, the balance of which the arbitrators ascertained, and awarded, that, upon the payment of the same, the certificates of stock, received by Simms from the United States, should be transferred to the defendant. This award was returned to the Court on the 20th of January 1817, and judgment thereon became absolute on the fourth day thereafter. This suit was brought on the 28th of the same month; and in March following, the balance awarded to Simms having been paid, the certificates were transferred to the defendant. It was further proved, by a witness, that some

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time previous to the 20th January 1817, the attorney of the plaintiff demanded of the defendant a performance of the agreement on which this action is brought, when he acknowledged that he had received the certificates of stock allowed for the fund; that a paper annexed to this agreement, being an order for 500 dollars, drawn by the defendant on Edward Gould, in favour of the plaintiff, dated in 1802, was the amount of the unliquidated demand referred to; and that his only objection to paying that sum, and the amount of the two notes for 2500 dollars, was a set-off which he had to make against the claim.

The following points of evidence were ruled in this cause:

1. That the deposition of a witness, living out of the District of Pennsylvania, and more than 100 miles from Philadelphia, cannot be read in evidence, unless it be taken under a commission. *Kvans vs. Hettick*, decided at October sessions, 1818, in this Court.

2. The certificate of Joseph Nourse, the Register of the Treasury Department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the Secretary of the Treasury, under the seal of the department, that Joseph Nourse is Register, was offered in evidence, and objected to.

The Court overruled the evidence, upon the ground, that it is not sufficient, that the officer who gives this certificate, has the custody of the papers, unless it also appeared, that he is authorized by law to certify such papers; which this officer is not. A sworn copy ought to have been produced.

It was contended by the counsel for the defendant, that the plaintiff was not entitled to recover in this action; because he had not proved, that the defendant had, at any time, obtained the possession of the lands conveyed to him by Edward Gould, or that he had been in a legal capacity to obtain the lawful possession of the same. The possession spoken of in the agreement, is a *legal* possession of the land itself; and consequently,

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excludes the idea of an equitable equivalent, which, against the will of the defendant, might be forced upon him.

That at the time this agreement was made, there existed two impediments to the defendant's obtaining legal possession of these lands. The first, was the title of the United States, derived under the cession of the state of Georgia, subject to the Indian title; and the legal title of Simms, under the deed made to him by the defendant prior to this agreement. Both these impediments were to be removed, before the payment of the stipulated sums to the plaintiff could be demanded. The former never was removed. The Act of cession by the state of Georgia stipulates, that the territory so ceded, should be for the use of the United States; and that not more than five millions of acres, should be applied to the satisfaction of claims not acknowledged by that state. To this the United States assented. In 1807, an Act of Congress was passed, to prevent any person from taking possession of the public lands, whether under the sanction of a title thereto or not, and authorizing the President to use the civil authority, or the military force, to remove all persons who should take such possession. The Act of March 1814, requires all persons having claims to lands under the state of Georgia, and not acknowledged by her, to release the same to the United States, before some day in January 1815, under the penalty of losing the compensation offered by that law, as well as being rendered incapable of maintaining any action to recover the possession of the lands themselves. The release, therefore, was not voluntary, but was given in compliance with a law, which, by disabling the defendant from obtaining possession of the land, discharged him from all the obligations imposed upon him by this contract, which were dependent upon the happening of that event.

The same objection is applicable to the legal title vested in Simms; and even if the jury could, under this issue, consider the receipt of the certificate of stock, as equivalent to the possession of the thing for which it was granted, this equivalent

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was not received by the defendant, until after the institution of this suit.

But, if the plaintiff is entitled to recover any thing in this action, it was contended that he cannot exceed the amount of the two notes for \$500 dollars; since it is obvious, that the defendant's draft on the plaintiff, for 500 dollars, made prior to the date of this agreement, could not be the unliquidated demand, which, "when it should be liquidated," the defendant promised to pay.

It was answered by the counsel for the plaintiff, that as to the unliquidated demand, the evidence was uncontradicted, that the defendant acknowledged it to be 500 dollars, and this ought to be conclusive with the jury.

As to the contingency, upon which, the sum agreed by the articles to be paid to the plaintiff, should become due, it could refer only to the impediments created by the law of Georgia, because that was public and notorious; with which both the parties were acquainted. The private conveyance from Bond to Simms, was known only to themselves; and consequently, could not be within the contemplation of the parties, nor could it be their intention to place the payment of the sums to the plaintiff, upon the mere volition of the defendant to pay off the incumbrance, and regain the possession, or to postpone it as it might suit his own convenience. Besides, this deed not having been communicated to the plaintiff, was a fraud upon the agreement, and is on that account to be disregarded.

The impediment created by the law of Georgia, was removed by the decision of the Supreme Court, in the case of *Fletcher vs. Peck*; and from that time, the defendant had a legal capacity to obtain possession of these lands, of which, if he did not choose to avail himself, it was his own neglect, which should not be turned to the prejudice of the plaintiff. The Indian title was not in the contemplation of the parties; and even if it had been, their title was nothing more than a privilege of hunt-

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ing, which did not interfere with the legal seisin, which the defendant might have acquired.

The Acts of Congress of 1803, 1807, and 1814, which are principally relied upon by the defendant's counsel, are unconstitutional, so far as they operated to affect the title of the defendant to these lands, being contrary to the 5th article of the amendment to the Constitution of the United States, which declares, that "private property shall not be taken for public use, without just compensation;" and this public use, even where a just compensation is made, can never mean the filling of the public coffers by the sales of private property, seized expressly for that purpose.

But, at all events, the right of the plaintiff to bring this suit, commenced at the moment that Simms released to the United States, and thereby deprived the defendant of any legal capacity to obtain possession of the land. That release was voluntary, and it was the act of the defendant's trustee. The rule of law, therefore, which is admitted by the defendant's counsel, applies strictly to this case.

The counsel claimed interest from the time when a legal capacity existed in the defendant to obtain the possession of these lands.

*WASHINGTON, Justice*, charged the jury. This is an action of covenant brought upon certain articles of agreement, entered into between these parties, in the year 1804; whereby the defendant agreed to pay to the plaintiff, two notes for 1,250 dollars each, and an unliquidated demand of the plaintiff, when the same should be liquidated, forthwith, after he, (the defendant,) should obtain, or be in legal capacity to obtain the lawful possession of the Georgia lands, conveyed to him by Edward Gould. The question which arises out of the issue, is, whether the defendant was, at any time previous to the institution of this suit, and when, in a legal capacity to obtain the lawful possession of these lands?

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It is to be observed, that the subject of inquiry is, *legal capacity to obtain possession*, and not the *actual* obtaining of it. It was not the intention of the plaintiff to leave it in the option of the defendant, to defeat, or to postpone his right to the stipulated sum, by forbearing to exercise the legal capacity he might at any time acquire, to gain the possession. So long as this capacity should be opposed by legal impediments, so long the rights of the plaintiff were suspended. When they should cease to exist, those rights were in full force, notwithstanding other impediments created by the defendant himself, which it was within his own power to remove. A contrary doctrine would have authorized the defendant to take advantage of his own wrong, in fraud of his contract, and to the detriment of the plaintiff.

The impediments known to the parties, and which, no doubt, were within their contemplation, were, 1st, the Indian title; and, 2d, the law of Georgia; the title acquired by the United States, under the cession of that state; and the laws of the United States in relation to these lands. No other impediment has been stated by the defendant's counsel, except that produced by the conveyance to Simms, which will hereafter be noticed.

As to the Indian title, that was removed by the treaty of August 1814. The other impediments were in full operation, in November 1814; and have never, to this moment, been removed. These were, 1st. The rescinding law, as it is styled, of the legislature of Georgia, passed in the year 1796, professing to annul the Act, under which the grant to the Georgia Company was made; and forbidding the Courts of justice, in any action which might be depending before them, to admit the said law or grant to be given in evidence: 2d. The cession made by the state of Georgia, to the United States, in the year 1802,\* of a large territory of country, including the lands

\* 1 Vol. Laws, p. 469.

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which form the basis of the present controversy. This instrument, after ceding to the United States all the right of Georgia to the jurisdiction and soil of the above territory, stipulates, amongst other things, as a condition, that, after satisfying certain claims previously mentioned, the ceded lands should form a common fund for the United States, and be disposed of for that purpose, and none other; provided that Congress may, within twelve months after the assent of Georgia to the boundary established by that agreement shall have been declared, dispose of, or appropriate, not more than five millions of acres of the ceded lands, to satisfy and compensate any claims, other than those before recognised by that agreement, which may be made to any part of the said lands; but that no such cession or compensation should be made, unless in virtue of a law which should be passed within the above period.

3d. The Act of Congress, passed on the 3d of March 1813, (3 vol. p. 546,) "regulating the grants of lands, and providing for the disposal of the lands of the United States, south of the state of Tennessee." The 8th section declares, that the residue of the five millions of acres reserved by the articles of cession, to satisfy the claims not confirmed by that agreement, after satisfying certain enumerated claims, or so much of the proceeds thereof as may be necessary, shall be appropriated for compensating such other claims to the lands of the United States, south of the Tennessee, not recognised in said cession; which are derived from any Act of Georgia, which Congress may hereafter think fit to provide for. Provided, that no claim shall be embraced, but such of which the evidence shall be exhibited to the Secretary of State, to be recorded, before the 1st day of January following; and that no claim, grant, deed, or other written evidence of claim to such lands, derived under the state of Georgia, and not recognised by the agreement of cession, should ever be admitted as evidence in any Court of the United States; unless the same has been exhibited to be recorded, within the time, and in the manner before directed.



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It is further provided, that nothing contained in this Act shall be construed to recognise or affect the claims of any persons to any of the said lands.

The 9th section provides for the appointment of commissioners, to receive propositions of compromise and settlement from the companies and persons claiming the said lands; and to report their opinion to Congress.

4th. The Act of Congress, passed on the 3d March 1807, (4 vol. 118,) "to prevent settlements being made on lands ceded to the United States, until authorized by law;" which declares, that if any person shall, after the passage of the law, take possession of, or settle upon, any lands ceded to the United States by a foreign nation, or by any state; which lands shall not have been previously sold, ceded, or leased by the United States, or the claim thereto by such person shall not have been previously recognised and confirmed by the United States; said offender shall forfeit all his right to the said land, whatever it may be; and the President is authorized to direct the marshal, and to employ, if necessary, the military force, to dispossess and remove him.

5th. The Act of Congress, passed the 31st March 1814, (4 vol. 651,) "providing for the indemnification of certain claimants of public lands in the Mississippi Territory." This Act allows, to persons claiming lands in the Mississippi Territory, under the Act of Georgia, of the 7th of January 1795, whose claims have been exhibited as he recorded, according to the Act of 3d March 1803, until the first Monday in January 1815; to deposit in the office of the Secretary of State, a legal release of all such claim, to the United States, and a transfer to the United States of their right to any money which had been paid by them, &c., into the treasury of Georgia, as the consideration of the purchase of the said land, &c.; such release and transfer to take effect, on the indemnification of such claimants being made, conformably to the provisions of this Act.

The 3d section creates a board of commissioners, whose duty  
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it was to decide on the validity of the releases, &c.; and also to decide all controversies arising on adverse claims.

The 3d section provides, that, on the report of the commissioners to the President, as to the sufficiency of the releases, &c., the names of the claimants, whose claims they have allowed, and the relative proportions on which they are entitled to indemnity under this act; the President is required to cause to be issued, at the Treasury department, certificates of stock to such claimants, not bearing an interest; to be paid out of the first moneys in the treasury, arising from the sales of public lands in the Mississippi Territory, after payment of the debt to Georgia, expenses, &c. To the different companies are allotted certain sums; and amongst others, to the Georgia Company the sum of 225,000 dollars.

The 9th section declares, that, if any person claiming land under the aforesaid Act of Georgia, of the 7th of January 1796, shall neglect or refuse to compromise such claim, in conformity with the provisions of this Act, the United States shall be, and are hereby declared to be, exonerated from all such claim; and the same shall be for ever barred; and no evidence of any such claim shall be admitted to be pleaded, or allowed to be given in evidence, in any Court, against any grant derived from the United States.

According to the terms held out by this law, Simms, on the 8th November 1814, released to the United States all his title to the lands claimed under the above Act of Georgia, of the 7th of January 1795, and the grant made in pursuance thereof; and received the compensation allowed by the above Act of Congress, in certificates of stock.

Upon this statement of the Acts of Georgia, and of the United States, it must be admitted, that, unless the defendant is prevented by the release executed by Simms, as just stated, and the acceptance of the compensation allowed by the above Act of Congress, from asserting that he has never been in a legal capacity to obtain possession of these lands; the impedi-

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Bleeker vs. Bond.

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ments to his obtaining such possession, which existed at the time when this contract was entered into, have never been removed, and that a legal incapacity to obtain such possession still continues.

What, then, is the legal effect of this release?

Let it in the outset be observed, that the act of Simms is to be considered as that of the defendant. The deed to him, though absolute in form, was substantially a mortgage for securing the payment of money, and was so decided by the award of arbitrators, and the judgment of a Court thereon, rendered in January 1817. Simms was therefore a trustee for the defendant, who was bound by his acts; more especially as he afterwards affirmed them, by bringing an action to recover the certificates of stock which he received from the United States, as the consideration of his release. This being the case, it must be admitted, that the effect of the release was to pass to the United States all the right and title of the defendant to these lands, and that it created a perpetual bar to any claim which he might thereafter assert to the possession of them. It was a solemn transfer of his right to these lands, for a certain consideration paid by the United States; and from the moment that this contract was complete, *he deprived himself of the legal capacity to obtain possession of them.* The rule of law is admitted by the defendant's counsel, that, if one person is bound to pay a sum of money, upon the happening of a particular event, which is prevented by the obligor, it is the same thing as if the event had actually taken place; and the right of the obligee to claim the stipulated sum immediately arises.

But it is contended by the defendant's counsel, that if the law discharges, or incapacitates the obligor from performing the act, or renders the performance unlawful, his obligation is discharged.

This rule must also be admitted; and then the questions are—1. Whether, in this case, the defendant was prevented by the Acts of Congress before noticed, from obtaining possession of

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the lands mentioned in the agreement?—and if so, then—2. Whether he has not also barred himself by his release, so as to subject him to the operation of the first rule?

By the defendant's counsel, it is insisted, that the Act of 1807 rendered it unlawful for the defendant to take possession of these lands; and that the Acts of 1803 and 1814, barred the right of the defendant, not only to the lands themselves, but also to the compensation, unless he executed the release by a certain period. The alternative then presented to the defendant was, to receive the compensation offered by Congress, upon the condition of executing the release of his right, or to lose both that and the land.

In answer to this argument, it is contended, that those Acts are unconstitutional; and consequently, would not have prevented the defendant from obtaining possession of these lands, if he had not shut himself out of the tribunals of justice by his own act.

The Court feels the difficulty, as well as the delicacy of this question. It is one which has never been decided in any Court of the United States, to our knowledge. It is not whether the subject upon which Congress has legislated, was without the sphere of those powers which are conferred upon that body by the Constitution; because it is not to be denied, that the power of Congress to dispose of the public property, and to enact laws in reference thereto, is unlimited. But, can Congress legislate upon the rights of individuals, to property acquired or claimed by the United States, and enact laws of forfeiture, or otherwise to defeat those rights, either absolutely or conditionally, at the mere will and pleasure of that body?—does the power to pass laws, though unrestrained by the Constitution, include a power to decide upon private rights, and to dispose of private property, because the title asserted by the individual affects property claimed by the United States?

There are certain expressions of the Supreme Court, in the

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case of *Fletcher vs. Peck*, 6 Cranch, which seem to be not applicable to this subject; they are the following—

“The question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of reflection.” p. 136.

“How far the power of giving the law, may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never will be definitely stated. The validity of this rescinding Act might well be doubted, were Georgia a single sovereign power.” *Ib.*

“It may well be doubted, whether the nature of society, and of government, does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.” p. 136.

It is true, that private interests must be subservient to the public necessities. This results from the nature of the social compact. Under every government, be the form what it may, private property may be taken for public use, provided a fair compensation be paid for it; and the 5th article of the amendments to the Constitution of the United States has provided, that private property shall not be taken for public use, without just compensation. But who is to decide, as to the quantum of the compensation? If the power is exercised exclusively by the legislature, it is easy to perceive that it may be abused; and that the condition may be only nominally performed. Ought not the compensation, in all cases, to be judged of by indifferent persons, so selected as to afford a fair expectation of their acting impartially? The practice, we believe, is universal, in this country at least, to submit the question of compensation to persons summoned for that purpose, by process in nature of a writ of *ad quod damnum*. But are there not some limits to the exercise of the power itself, even where a compensation, fairly ascertained, is offered to be made? Can private

property be seized, for the sole purpose of filling the public coffers with the product of its sale?

These are questions of vast magnitude, which this Court would deem it its duty to submit to the decision of the Supreme Court, if they were necessarily involved in the determination of this cause. We think that they are not; and that this case may be decided upon general principles of law, which may be predicated upon an admission of the validity of the Acts of Congress which have been referred to. The inquiry, however, into this subject, which has been but partially made, will be found to bear upon another view which is yet to be taken of this case.

But it will first be necessary, to inquire into the nature of the title of the purchasers under the Georgia Company, to the lands granted to it by the state of Georgia.

In the case of *Fletcher vs. Peck*, the following points were resolved—1. That the lands lay within the state of Georgia, and that that state had power to grant them. 2. That the Indian title, until extinguished, was to be respected by Courts; but that it was not such as was absolutely repugnant to seisin, in fee, on the part of the state.

3. That the estate granted by Georgia, having passed into the hands of purchasers, for a valuable consideration, without notice; the state was restrained, *either by general principles which are common to our free institutions, or by the Constitution of the United States*, from passing any law to impair the estate vested in the said purchasers.

If this then was the title of those persons, who purchased from the grantees, under the state of Georgia, as against that state, it could not, we conceive, be impaired by the subsequent cession of Georgia to the United States. The derivative title of the latter, could not, upon general principles of law, be other, or better, than that of the former.

If this be so, then the purchasers under the Georgia Company, acquired a good and valid title against the United States.

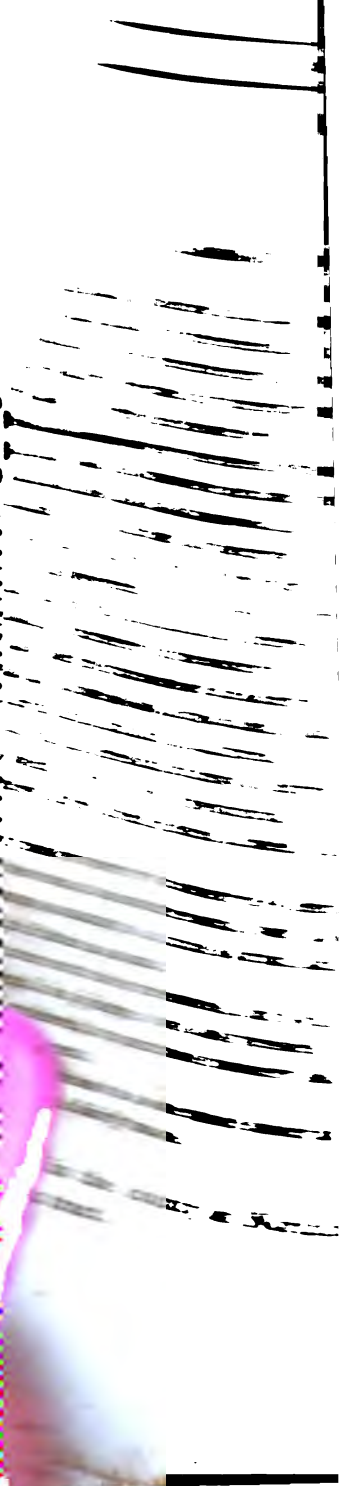
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Admitting, then, the validity of the Acts of Congress, for the purpose of getting at the question, how far the release of Simms to the United States, can legally affect this case; all that can be said of them is, that they prevented the defendant from obtaining possession of the land; and barred his claim to the same, either against the United States, or against any grantee under them. Still the claim was admitted, or else it would have been unnecessary to require a release of it, as the consideration of the compensation to be paid by the United States. It cannot be contended, that the defendant was compelled to give the release. He was at perfect liberty to do it or not, as he pleased. He preferred the former; and then, by a voluntary act, he extinguished for ever all his right to the land, and incapacitated himself to obtain the possession of it; and, for this renunciation, he received the stipulated consideration.

So far as his own interest was concerned, the defendant had unquestionably a right to enter into this contract with the United States. It was perhaps prudent in him to do so. But he had no right, by any act of his, and without the consent of the plaintiff, to compromise his interest, and for ever to close the door against his appeal to the justice of the nation, even if he had no stronger ground to stand upon. As to the defendant, it may be admitted, that he bettered his situation, by acceding to the terms held out by the law. Not so as to the plaintiff, if the argument of the defendant's counsel be correct, that, although he has received an equivalent for the possession of the land, he is discharged from his obligation to pay the plaintiff; because he could not, at the time he received it, and never can obtain, the possession of the land. Independent of the release, the defendant might have appealed to the Justice of Congress to repeal the laws, so far as they had deprived him of his rights; and, if the arguments which have been urged in the preceding part of this opinion, are not strong enough to impeach the validity of the laws in question, they could scarcely have failed to



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branches upon the property, the defendant might, at any time, have recovered the possession; and it could never have been competent to the defendant to urge an incapacity, produced by his own act, and which it was in his power to remove, as a reason against paying the sums stipulated in this agreement. If he could, then the alternative, so cautiously provided in the agreement, would have been altogether without meaning; the legal capacity to obtain possession, and the obtaining of it, would in effect mean the same thing.

The next question is, to what amount is the plaintiff entitled to a verdict? As to the two notes for 3500 dollars, no question has been made, provided the plaintiff can recover any thing. There is more difficulty in respect to the 500 dollars. On the one hand, it is contended, that this is an ascertained sum, and can by no means be brought within the meaning of the expressions in the agreement, *an unliquidated demand*. On the other, it is insisted, that as no evidence has been given of any unliquidated demand to which the expressions in the agreement could refer, and the testimony of the witness is positive, that the defendant acknowledged this sum to be the amount due; this must be considered to be the unliquidated claim referred to in the agreement. This point is submitted to the jury.

As to interest, it clearly ought not to be calculated beyond the 8th of November 1814, when the release was executed. And the jury may give interest from that period, or from the period when the defendant recognised, or otherwise approved of the release made by his trustee, which was some time in the year 1816 or 1817.

*Verdict for the plaintiff.*

Ewing, and Condy, for the plaintiff.

Binney, and Joseph R. Ingersoll, for the defendant.

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 Lessee of Cooper vs. Galbraith.
 

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## LESSEE OF COOPER vs. GALBRAITH.

Ejectment for a tract of land purchased at a sheriff's sale, under a *conditiones exponas* against the defendant.

The plaintiff in ejectment must show a legal right to entry in general; and unless under special circumstances, the defendant should be let in, to prove the title an equitable one.

No person can recover or defend himself against his own grant or covenant; nor can any one controvert, against his own acts, though not by deed, a title which he has thus acknowledged.

In an ejectment by a *second mortgagee*, against the mortgagor, the latter cannot set up the title of the *first mortgagee*.

The sheriff is empowered, by law, to convey to the purchaser under an execution, all the right, title, and interest of the defendant; and he acts as the defendant's attorney, appointed by law to sell and convey the land.

In an ejectment, by the purchaser at a sheriff's sale, against the defendant in the execution, or those who may claim under him, the plaintiff need not show any other title than the judgment, execution, and the sheriff's deed; and this title the defendant cannot controvert.

Citizenship, when spoken of in the Constitution, in reference to the jurisdiction of the Courts of the United States, means nothing more than residence.

If a citizen of one state thinks proper to change his domicile, and to remove with his family, if he have one, to another state, with a *bona fide* intention to reside there, he becomes instantly a citizen of that state, and may sue in the Courts of the United States as such.

Fraud and official misconduct are not to be presumed, but should be proved; and it is not a fraud, or illegal, in a judge, who has presided in the Court in which the judgment was rendered, to purchase property sold under an execution issued upon such judgment.

Inadequacy of consideration is no objection to a sale made under an execution; provided the sale was legally and fairly made.

**THIS** was an ejectment for land in the county of Northumberland, called the Limestone Lick tract.

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Lessee of Cooper vs. Galbraith.

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This land was purchased at sheriff's sale by George Lang, on the 17th of November 1807, under a *venditioni exponas*, and by regular conveyances, the title to the said land became vested in the lessor of the plaintiff. Possession was obtained by the purchaser some time after the sale, and continued in him until about the year 1812; when the defendant entered into a part of the land for which this ejectment is brought.

It was proved, that the lessor of the plaintiff was a naturalized citizen of Pennsylvania, and resided in this state, in the county of Northumberland, until the year 1816. In September 1815, he resigned his professorship in the College of Carlisle, with an intention, as he declared, of removing to New-Orleans, with a view of engaging in the practice of the law. About the same time, he broke up his family establishment, disposed of his furniture, and remained, with his family, for some time, at the house of a friend, as a visitor. He afterwards relinquished his intention of going to New-Orleans; and, in the autumn of the following year, he removed, with his family, consisting of his wife, two children, and his wife's sister, to Camden, in New-Jersey, on the opposite side of the river to Philadelphia; where he rented a house for a year, and continued to reside there until November 1817; when he removed to Philadelphia, where he has ever since resided. In December 1816, he was elected a professor in the College of Philadelphia, where he delivered a course of lectures, coming to the city for that purpose, and returning in the afternoon to his family in Camden.

The defendant offered in evidence to show, that the title to the land in question, when purchased by George Lang, was merely an equitable estate; which, it was contended by his counsel, is insufficient to support an ejectment in this Court.

This evidence was objected to, upon the ground that a defendant, whose land has been sold under an execution, and those claiming under him, will not be permitted, in an ejectment, to recover the possession, to impeach the title, or to show an out-

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Lecture of Cooper *vs.* Gulliver.

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showing better title in a third person. The plaintiff need only show the judgment, the execution, and the sheriff's deed. 3 Caines, 188. 10 Johns. 223. 2 Yeates, 443. 5 Binney, 270. 4 Johns. 22. 2 Binney, 468. The legal right of possession which the defendant had, together with all his right and title to the land, passed by the sheriff's deed to the purchaser, which, as between the purchaser and the defendant in the executions, or those claiming under him, is sufficient in ejectment. The case of Carson's lessee *vs.* Boudinot, in this Court; which will be relied on by the other side; does not contravene this doctrine; because Boudinot, the defendant in the ejectment, was not the defendant in the execution; nor did he claim under that defendant;—the legal estate was in Boudinot, and the equitable estate of the defendant in the execution, which alone was sold, was derived under a contract with the defendant in the ejectment.

In support of the evidence, it was contended, that the ground upon which all the decisions which have been read proceed, are, that the defendant in the execution is considered, *quasi* a tenant holding over; and therefore, he cannot deny the title of his landlord. But the reasons which govern those cases, do not apply to this; because it appears, that the defendant relinquished the possession for about four years, and that he afterwards re-entered. Whether his re-entry was tortious, or under a claim of title, is immaterial. The privity of landlord and tenant was destroyed by his relinquishment of possession; and he has now a right to stand upon his newly acquired possession, and to call upon the lessor of the plaintiff to show a legal right of entry; an equitable title will not do in this Court, as has been repeatedly decided. The counsel referred to the Act of Assembly of the 6th of April 1802, giving a speedy remedy to purchasers at sheriff's sales to recover the possession. They also relied on the case of Carson's lessee *vs.* Boudinot.

*WASHINGTON, Justice*, delivered the opinion of the Court.

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Lessee of Cooper vs. Galbraith.

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The general rule is undeniable, that the plaintiff in ejectment, must show a *legal* right of entry, to entitle him to a verdict; and that, if his title appear to be merely equitable, he does not maintain his action. If, then, the defendant is permitted by the rules of law, to disclose the real facts of the case, and to avail himself of defects in the title of the lessor of the plaintiff, by showing that that title is merely equitable, or is inferior to some other outstanding title in a third person; the evidence now offered ought to be received.

The question is, can the defendant oppose the title of the plaintiff's lessor, claimed under the sheriff's deed, by showing that the title of the defendant, at the time of the sale, was merely equitable, or was for any other reason defective?

Let this question be considered under the following aspects: 1st, as if this deed had been made by the defendant himself; and, 2d, as made by the sheriff.

In the first case, it is clear, that this defence would have been inadmissible, upon the principle, that a man cannot recover in ejectment, nor defend himself against his own covenant or grant. He is estopped by his own act, from saying that his title was defective, when his deed professes to pass a good title. Upon a similar principle, a man will not be permitted, against his own act, though not by deed, to controvert the title which he has thus acknowledged; as if one man came into possession of land, by permission of another, he thereby admits the title of that other; and, in an ejectment to recover back the possession, he cannot question it.

Upon this principle it is, that, in an ejectment by a second mortgagee against the mortgagor, the latter cannot protect his possession, by setting up the outstanding legal title in the first mortgagee; 3 Burr, 1416. 4 Johns. Rep. 216. 1 T. Rep. 758. And in an ejectment by the lessor against his lessee, or any person claiming under the lessee, the defendant will not be allowed to set up a defect in the title of the plaintiff, or to show an outstanding title in a third person. *Druer vs. Laurence*, 2

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Lessee of Cooper *vs.* Galbreath.

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Wm. Blac. 1259. 12 Salk. 347. 10 Johns. Rep. 352. 292. Doe *vs.* Clark, 14 East. 368. 3 Caines's Rep. 188.

The doctrine maintained by these decisions, does not in any manner infringe upon the rule first stated, that the plaintiff must show a legal right of entry; because a conveyance by a person in possession, passes, *prima facie*, a legal estate; which the defendant, being estopped by his own act from controverting, by showing that he only could convey an equitable estate, no such defect in the plaintiff's title does or can appear; as between these parties, the plaintiff's title appears to be founded upon a legal right of entry.

2. The sheriff is empowered by law, to convey by deed to the purchaser, under an execution, all the right, title, interest, and estate of the defendant, as fully as the defendant himself, or an attorney empowered for that purpose by him, could have done. The officer, in fact, acts as such attorney, appointed for that purpose by law. The purchase money is paid to the defendant, in the execution, or is applied to his use, in discharge of his debt; between whom and the purchaser, the law raises a contract, in like manner as if the conveyance had been made by him. The cases cited by the plaintiff's counsel, are full to the point, that a purchaser under an execution, in an ejectment against the defendant in the execution, or one claiming under him, need not show any other title than the judgment, execution, and sheriff's deed; and that the defendant will not be permitted to controvert such title, by showing it to be defective, or by setting up a better outstanding title in a third person. To these cases, may be added the case of Doe on the demise of De Costa *vs.* Wharton, 8 T. Rep. 2; the case of Carson's Lessee *vs.* Boudinot, in this Court, was that of an ejectment, brought by the purchaser of a mere equity, under the sheriff's sale, not against the debtor, or a person claiming under him; but against the owner of the legal estate, under whom the debtor claimed an equitable title. It is therefore consistent with all the cases that have been referred to.

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Lessee of Cooper vs. Galbraith.

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But it is contended, by the defendant's counsel, that the present case differs from those which have been cited, in the circumstance, that the lessor of the plaintiff had the full effect of his purchase, by having had the possession of the premises; and that the defendant, having afterwards gained the possession, has a right to rely upon that, until the lessor of the plaintiff has shown a legal right of entry in himself.

The difference in point of law, produced by this circumstance, is not discerned by the Court. By resigning the possession at one time, and afterwards regaining it, the defendant does not cease to be the same person, whose entire interest in this estate was conveyed by the sheriff, and subject to every disability which that conveyance imposed upon him. If the conveyance had been made by himself, instead of the sheriff, it is obvious, that, against his own act, he would be as much estopped to set up a defect in the title he had passed to the plaintiff in this case, as he would have been had he refused at first to surrender the possession. The disability to make this defence is so firmly attached to him, and to all those claiming under him, that he cannot shake it off by any device of this kind. Having shown that there is no difference between a sheriff's deed regularly made, and a deed by the defendant himself, the same conclusion follows.

If the defendant had entered upon this land, under a title better than that which the plaintiff's lessor obtained under the sheriff's deed, afterwards acquired, he might certainly have availed himself of it in this ejectment.

The opinion of the Court, then, is, that the evidence offered ought not to be admitted.

The objections made by the defendant's counsel were, 1st. That the lessor of the plaintiff, notwithstanding his temporary removal to the state of New-Jersey, continued to be a citizen of this state, and therefore this Court has not jurisdiction of the case. That, although his family resided in the former state, during a year prior to the institution of this suit, and the plain-

tiff generally returned to Camden at night; still his professional duties, as a member of the University, were performed in this city, and here he spent his days during a great part of that year. 1 M. & S. 103. 5 Vez. 787. 2d. The *fiery facias*, under which the sale of the land was made, commanded the sheriff to levy on the real estate of the defendant, in case he had no personal estate; and the sheriff not having returned that the defendant had no personal estate, it does not appear that he had any authority to serve and sell his land; and consequently, the sale was void. The deed of the sheriff is not even *prima facie* evidence, that all proper steps were pursued by the officer, to justify the sale. 4 Wheat. 77. 2 Binn. 231. 4 Yentes, 341.

3. There is no evidence that the sale of this land was adjourned to the 17th day of November, when it was sold; and the 16th having been the day mentioned in the sheriff's advertisement, the sale could not legally take place on any other day, without a new advertisement.

4. On the merits of the case, it was contended, that the lessor of the plaintiff was the presiding Judge of the Court in which this judgment was rendered; and it appears in evidence, that he purchased an interest in that judgment, and was concerned with the nominal purchaser and others in the purchase of this land under the execution;—that this conduct amounted to a breach of his official duty; and, in short, that the whole transaction was tainted by such marks of fraud, imposition, and misconduct, as ought to invalidate the purchase.

It was answered, by the plaintiff's counsel,—

1. That the evidence in the cause is complete, to show an abandonment of Pennsylvania, and a *bona fide* removal to the state of New-Jersey.

2. The Act of Assembly of this state, passed the 13th April 1807, made no other alteration in the law of 1705, than to forbid a *ca. sa.* to issue where the plaintiff had personal or real estate; and the Act of 1705 was equally imperative, that the real estate was only to be levied upon in defect of the personal.



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Yet, during the course of a century, the return of the *fiert facias* has uniformly been similar to that under which this land was taken in execution; and the doctrine contended for on the other side, if upheld by the Court, would uproot most of the landed titles in this state.

The protection of the real estate against seizure and sale, where there is personal property, is a privilege intended for the advantage of the debtor. If he chooses to waive it, he is at liberty to do so, either expressly or by implication. In this case, he has done so expressly, by an agreement made in August 1807; that if he did not pay the executions which had been levied on this land, and also on the Beaver dam tract, in four weeks, the land might then be sold. This agreement amounts to an acknowledgment that there was no personal property; or, if there was, it is a waiver of the defendant's privilege of insisting that his personal property should be first seized and sold; and he thereby consents, unconditionally, to the sale of the land, if the executions should not be satisfied within the time mentioned. Cases cited, 8 Johns. 366. 1 Idem. 45. 4 Yeates, 22.

3. This objection is contradicted by the record; which states, that this land was offered for sale on the 16th, and adjourned over till the succeeding day.

4. The argument, under this head, proceeded principally upon the evidence given in the cause, which was voluminous.

*WASHINGTON, Justice*, charged the jury. The question of jurisdiction is first to be considered. It is composed of law and fact; and as soon as the latter is ascertained, the question is relieved from every difficulty. Citizenship, when spoken of in the Constitution in reference to the jurisdiction of the Courts of the United States, means nothing more than residence. The citizens of each state, are entitled to all the privileges and immunities of citizens in the several states; but to give jurisdiction to the Courts of the United States, the suit must be be-

between citizens residing in different states, or between a citizen and an alien. If a citizen of one state should think proper to change his domicile, and to remove himself and family, if he have one, into another state, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the state to which he removes; he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that state, and may maintain an action in the Circuit Court of the state which he has abandoned, or in that of any other state, except the one in which he has settled himself. Time, in relation to his new residence, occupation, a sudden removal back to the state he had abandoned, after instituting a suit in the Circuit Court of that state; and the like; are circumstances which may be relied upon, to show, that his first removal was not *bona fide*, or intended to be permanent; but they will not be sufficient to disprove his citizenship in the place of his new domicile, and to exclude him from the jurisdiction of the Circuit Court for the district in which he had formerly resided; if the jury are satisfied, from the evidence, that his first removal was *bona fide*, and without an intention of returning. And, if the jury be so satisfied, the jurisdiction will not be ousted, though it should appear, that one of the motives of the plaintiff in removing, or indeed his only motive, was to enable him to bring a suit in a Court of the United States, sitting in the state he had removed from.

The circumstances to prove a *bona fide* intention in the lessor of the plaintiff, to change his domicile, are very strong. He was the Professor of Chemistry, in the College of Carlisle; the salary was small; and it is probable, insufficient to support his family. He spoke to his friends, at different times, of his determination to remove to New-Orleans, or to Alabama; and there to prosecute the practice of law. He accordingly resigned his Professorship, sold his furniture, broke up his family establishment; and, after spending some time in the family of a friend, as guest, he rented a house for a year, in Cap-

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den, and there re-established himself and his family. It was after this step was taken, that he was elected a Professor in the University of this city; where he was seen in the forenoon attending to his duties; and in the evening he returned to his family. His occupation in Philadelphia, under these circumstances, is not of itself sufficient to disprove his having been, at the same time, a resident citizen of the state where his family was.

In *Hilton's Estate vs. Brown*, in this Court, the case was, that Joseph Griswold, who resided with his family in New-York, came to Philadelphia, with his son, in order to establish him here as a distiller, and to instruct him in that art. He continued here, engaged in that business, for eight or nine months, returning at intervals, during that period, to visit his family; and, after he had completed the business which caused his visit to this city, he returned to his family in New-York, and there remained. The Court decided, that the temporary abode of Griswold in Philadelphia, without his family, for a special purpose, with the *animo revertendi* always continuing, did not make him an inhabitant of this state.

Having thus stated what are the principles of law which must govern this case, the jury will decide, whether, upon the evidence, the removal of the plaintiff to New-Jersey was *bona fide*, and with intention to become a resident and inhabitant of that state.

2. & 3. The answers given to these objections, by the counsel for the plaintiff, are entirely satisfactory. No case was produced, in which it has been decided by any Court of this State, that it is necessary for the sheriff to return on the *fieri facias*, that the defendant has no personal estate. This is a matter which must always be within the defendant's own knowledge, and it would seem reasonable, at least, that if, in point of fact, he has personal property, and intends to object on that account, to the levy on his real estate, he should make it before the Court from which the execution issued. But be this as it may,

*Lester v. Cooper et. al.*

there is strong evidence in this case, of the defendant's consent that the land should be sold, upon a certain event which took place. This amounted to a waiver of the objection, by which the defendant ought to be bound.

4. Upon the merits of this cause, we can do no more than lay down a few principles of law, which ought to govern the jury, in the decision which they may come to. The lawyer of the plaintiff is charged with judicial misconduct, and gross fraud, in acquiring the title on which this action is founded.

Let it be premised, that fraud and misconduct, of the gross nature imputed to Mr. Cooper, are not to be presumed; but the reverse. He who makes these charges, must establish them by evidence to your satisfaction. It should also appear, that the fraud or misconduct imputed to him, was of a nature to injure the defendant, and was applicable to the particular subject which you have to decide.

We understand from the evidence, as well as from the admission of the defendant's counsel, that, whatever interest the plaintiff acquired in the execution, under which this land was sold, was subsequent to the time it was issued; and that no question respecting that execution, or the sale of the Limestone Lick tract, was ever brought before the Court of which the plaintiff was a Judge, until the 19th of November, when the sale of this tract, and of the Beaver dam tract, purchased by Mr. Albright, was confirmed; on which occasion, the record states, that Judge Cooper declared he had an interest, and left the bench.

The assertions that a Judge cannot legally become interested in an execution, which has issued under the authority of the Court of which he is a member, or in property sold under such execution; and that by making such acquisitions he is guilty of a breach of his duty as a Judge, do not receive the sanction of this Court. It may be indiscreet in him to do so; and it may be unbecoming the dignity of his station to speculate in purchases of this sort, unless under very peculiar circumstances.

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*Lessee of Cooper vs. Galbraith.*

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Whenever a question comes before a Court, in which the Judge knows that he has an interest of any kind, he violates decorum, morality, and law, by remaining on the seat of justice, and giving an opinion in the case. We should not hesitate in saying, that a claim, founded upon such a gross breach of duty, ought not to receive the countenance of any Court.

But we do not understand, even from the defendant's counsel, that the plaintiff gave any judicial opinion respecting the sale of this property; or that any question was, at any time, brought before the Court, which called for judicial interposition, except on the 18th, when he very properly retired from the bench.

His direction to the sheriff, to sell this land for hard money, was not given judicially, nor could it be; nor does it appear that it was so understood by the sheriff. As a party concerned in interest, he had a right to direct the sheriff to sell for specie, and for ready money. The writ was returnable to that session of the Court, and therefore the sheriff had no authority to give credit without the consent of the person interested in the execution; and it is no just or legal ground of complaint against them, that they did not give such consent.

As to all that has been said and proved, respecting the sale of the Beaver dam tract, it can have nothing to do with the question now under discussion,—that land was not purchased by the plaintiff, and is not involved in this controversy.

As little have you to do with the inadequate price at which it is said this land was sold. If the sale was fair, and in other respects legal, inadequacy of value, given for property sold at public auction, was never yet supposed, much less decided, to be a ground for invalidating the sale.

*Verdict for plaintiff.*

Binney, and Chauncey, for lessor of plaintiff.

Rawle, and Tilghman, for defendant.

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Fairchild vs. Camac.

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**FAIRCHILD vs. CAMAC.**

A judgment having been once entered on a warrant of attorney, the warrant becomes *functus officio*; and although in the warrant, authority may have been given to enter judgments, in the plural, that can only mean a second judgment, where the first has been set aside; and not as authority to enter two judgments subsisting at the same time.

**RULE** to show cause, why the judgment rendered in this case should not be upheld.

The plaintiff produced a bond, executed by the defendant, to the plaintiff, both subjects of the King of the United Kingdoms of Great Britain and Ireland, and at the time, residents in Ireland, bearing date in 1801, with a warrant of attorney annexed, to confess judgment thereon; under which power, this judgment was entered.

The defendant, in support of the rule, contended, that judgment had long since been entered upon this bond, in Ireland, as appeared by the following endorsement on it:—"Judgment entered the 26th of October 1808;" consequently, that there no longer remains any remedy on the bond; but an action should have been brought on the judgment. It was also objected, that according to the practice of the Courts of this state, as well as of the English Courts, judgment upon a warrant of attorney could not be entered up after ten years from the time the money became due, without leave of the Court, upon a motion for that purpose; and the judgment in this case was entered seventeen years after.

In answer to these objections, it was insisted—1. That the entry upon the bond is not sufficient or proper evidence, to prove that a judgment had been entered up prior to the present; and if it were, still, the warrant authorized the entering

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Fairchild vs. Cameron

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up of judgments;—and 2. That the rule as to the necessity of obtaining leave of the Court after ten years, is only applicable to cases where the plaintiff has been within the state during that time.

Cases cited, 1 East, 436, *McClure vs. Duncan*. 3 East, 251, *Drake vs. Mitchell*.

*WASHINGTON, Justice.* The first objection is fatal to this judgment. The proof of a prior judgment is not given by the defendant, but appears upon the bond and warrant of attorney, upon which this judgment was rendered, and which the plaintiff himself gives in evidence, to support the present judgment: Taking it, then, as proved, that a judgment was entered on the 29th of October 1803, the warrant of attorney was then *functus officio*.

As to the argument, that the warrant authorizes the attorney to confess a judgment, or judgments, in the plural, there is nothing in it; the latter expression could only apply to an imperfect judgment, which might be set aside, or reversed for error. It could never contemplate the existence of two valid and subsisting judgments, at the same time, and upon the same bond.

*Rule made absolute.*

Gibson, for the defendant.

Charles J. Ingersoll, for the plaintiff.

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Clark's Executors *vs.* Wilson.

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CLARK'S EXECUTORS *vs.* WILSON.

*Motion to dissolve a foreign attachment.* The cause of action stated in the affidavit, which was made by one Smith, as the agent of the plaintiff's testator, was the non-performance, by the defendant, of the stipulations in a charter party, made with the plaintiff's testator, the owner of a ship; the defendant having refused and wholly renounced the employment of the ship on the voyage described in the contract; by which damages were sustained to a large amount.

The amount of the plaintiff's claim cannot with propriety be averred or sworn to; and being entirely for unliquidated damages, to determine which no known standard can be referred to, a foreign attachment cannot be sustained.

The charter party having been entered into by Smith and the defendant, although in the body of it he states himself the agent of Clark, yet, as all the covenants are made with Smith, and he executed the instrument in his own name, without reference to Clark, the action cannot be sustained in the name of Clark.

It is no objection to a foreign attachment, that the plaintiff had sued out an attachment, in another state, for the same cause of action.

*Quere.* If the defendant had given bail to the first attachment, whether a second could be sustained.

THIS was a rule upon the plaintiff to show his cause of action, and why the foreign attachment, which had been issued, should not be dissolved.

The plaintiff showed cause, by producing the affidavit of John E. Smith, in which he swears; that, on the 31st August 1805, a covenant was entered into between the defendant and the deponent as agent of James Clark, the testator, at London, a copy of which is annexed to the affidavit; and that, in pursuance thereof, the ship Portsmouth, therein named, took on board, at Portsmouth, from the defendant, such lawful goods as the defendant thought proper to ship, and proceeded on her voyage



## Clark's Executors vs. Wilson.

for Montevideo, and touched, agreeably to said covenant, at the coast of Africa, for passengers for Montevideo; and, on her voyage thence, the ship, before her arrival at Montevideo, was, without any fault of the owner or his agents, seized on the coast of Africa and sent to London, where she was, detained for a long time, and then liberated, and restored to the deponent, as agent of Clark. That, with all possible despatch, he caused the said ship to be repaired, and then proposed to the defendant to cause the said ship to prosecute and complete the aforesaid voyage, and to do and perform every thing incumbent on him to do by the terms of the said covenant; and that he was willing and ready to perform the same.<sup>1</sup> But the defendant did not, and would not, permit the ship to perform the voyage, and refused so to do; and absolutely violated his contract therein, and wholly renounced the charter party, and the farther prosecution of the transaction connected therewith. That, if the said voyage had been proceeded in, agreeably to the covenant, and the deponent's offer as agent as aforesaid, the ship would have been employed during her said voyage 24 months, as the defendant believes; which, agreeably to the terms of the covenant, would have yielded a freight of £16,080 2s., and which, with the exception of a small credit, has been lost to the plaintiffs, by the breach of the said covenant by the defendant. He firmly believes, that damages, including interest, have been sustained by the plaintiffs, by said violation, to the amount of 102,000 dollars.

The material parts of a charter party similar to that referred to in this affidavit, are well stated by the Judge, in 8 East, 437.

*WASHINGTON, Justice*, delivered the opinion of the Court. Various reasons have been assigned why this attachment should be dissolved, of which two only will be particularly examined.

The first is, that this action is brought to recover unliquidated damages, which, it is contended, cannot be the subject of a foreign attachment under the law of this state.

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Clark's Executors *vs.* Wilson.

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This subject was very much considered in the case of *Fisher vs. Consequa*, cited at the bar;\* and although we do not think that the Court, in that case, gave too liberal a construction to the Attachment Law, we should nevertheless examine the ground with great caution, before we make any further advance. The principle decided in that case was, that a demand arising *ex contractu*, the amount of which was ascertained, or which was susceptible of ascertainment by some standard, referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it, or a jury to find it; might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action, or to the technical definition of *debt*, the expression used in the law.

The cause of action shown in this case was, in substance, that the defendant, in the attachment, agreed to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and, on failure to do so, to pay the difference between teas of the stipulated quality, and such as should be delivered;—that teas of inferior quality to that stated in the agreement, were delivered; and the plaintiff swore, that the difference amounted to a precise sum, in which the defendant was justly indebted to him. The standard, therefore, was the difference in the quality of two articles, and all that remained to be ascertained, was the value or amount of such difference; which was as easily ascertained, as the value of goods sold, where no price was agreed upon. The standard was fixed by the contract itself, and the amount of the claim, in reference to it, was so plainly to be ascertained, that the plaintiff was enabled to aver it in his affidavit, and he did so.

This action is founded on a charter party, by which the defendant covenants to pay to John E. Smith, his executors, &c., £670 per month; during the time the ship shall be employed by the freighter, during her intended voyage; and so in proportion for any time less than a month, in full of the freight of

\* See *ante*, vol. II. p. 382.

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the said vessel; and he covenants also, to pay two third parts of all pilotage and port charges, during the voyage; and also two third parts of all expenses of storing the ship's cargo at Montevideo—such freight, pilotage, and port charges, to be paid on the arrival and discharge of the ship at her destined port in Great Britain. He further covenants to furnish sufficient water and provisions, for all passengers she may take on board, during the voyage to Montevideo.

These are all the covenants in this instrument, on the part of the defendant; and it is obvious, that he is not liable for a breach of any of them, inasmuch as his performance depended upon the completion of the voyage, and the arrival and discharge of the ship at her destined port in Great Britain.

Whether the plaintiffs can maintain any action upon this charter party, by reason of the refusal of the defendant to take on board a cargo, and to prosecute the voyage, is a question which has not been considered by the Court; nor is it necessary that it should be decided. For, if an action can be maintained upon it, it still remains to be inquired, by what standard are the damages, which the plaintiffs have sustained on account of the refusal of the defendant to perform the voyage, to be ascertained? That furnished by the contract, was a certain sum per month, during the voyage, to be ascertained at its termination; but that event never took place; and consequently, no rule can be deduced from this source, to fit the present case. The affidavit, showing the cause of action, refers to the same standard; and must necessarily be equally defective. The plaintiffs' counsel is therefore compelled to go out of the contract; and there, finding himself perfectly at large, he has suggested a scheme for ascertaining the amount of the plaintiffs' loss; which he considers to be so entirely unexceptionable, that there could not be two opposing opinions respecting it, entertained by legal minds. This rule is, to deduct from the ordinary time consumed in performing such a voyage as that described in this charter party, estimated at the rate of £670

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sterling per month, the usual expenses incident to it; and to give to the plaintiff the difference.

We must be permitted to dissent from such a standard as this; because, if it be such a one as deserves the appellation of a legal rule, it would apply as well to the case of an original refusal of the freighter to proceed on the voyage, as to the subsequent refusal, after the fruitless attempt which was made in this case; and then it would happen, that the plaintiffs would be entitled to the stipulated freight, as if it had been earned; and yet the ship might be employed, during the whole period of the supposed duration of the voyage, in earning other freights for the owner. This would be most unjust; and yet it would result from the proposed rule:—discard it, and then it is not easy to perceive any other which affords a solitary landmark to guide, either the plaintiffs, in stating, and swearing to the amount of their demand, or the jury in ascertaining it. Smith swears, that he believes the plaintiffs have sustained damages, including interest, equal to the sum of 102,000 dollars; and this belief is obviously founded on another, that the freight would have amounted to that sum, if more contingencies than we have time to enumerate, had not happened. But, it has been already observed, that this witness assigns a very unsatisfactory reason for his belief; and consequently, it is entitled to very little respect.

This, then, is a case, in which unliquidated damages are demanded;—in which, the contract alleged as the cause of action, affords no rule for ascertaining them;—in which, the amount is not, and cannot, with propriety, be averred in the affidavit, and which is, and must be, altogether uncertain, until the jury have ascertained it; for which operation, no definite rule can be presented to them. In our opinion, it has not one feature of resemblance to the case of *Fisher vs. Consequa*. In the latter, there was a promise by the defendant, alleged and supported by oath, to pay the difference between two articles of different value; in the former, there is no promise or covenant of any

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kind, verified by oath, or even stated, to pay any thing in the event which took place. 2. We are of opinion, that this attachment cannot be supported; because the plaintiff has shown no cause of action whatever. In answer to this rule, calling upon him to show his cause of action, the plaintiff exhibits a charter party, entered into between the defendant and John E. Smith, the only parties who executed it, and between whom all the covenants are made. John E. Smith styles himself, it is true, in this instrument, agent of James Clark; and in his affidavit, he states, that he acted in this transaction as agent. But notwithstanding these allegations, it is too much to contend, that James Clark, who, by himself, or by his attorney, did not execute the deed, who is not even stated in the body of it to be a party, and with whom no one covenant is made, can support this action.

It is admitted, by the plaintiff's counsel, that, if the action were in the name of a total stranger to this transaction, advantage might be taken of it upon this rule; but it is insisted that the plaintiffs are beneficially interested in this covenant, and consequently, that the defendant should be put to his plea, to bar the plaintiff's right to maintain the action.

We cannot accede to this distinction. The question is not whether the plaintiff is a stranger in interest, but whether he shows a probable cause of action in himself? and if by his own showing he is not entitled to bring the action, the defendant ought not to be subjected to the inconvenience of giving special bail; in order to release his property from the attachment, and to enable him to defeat the action by plea.

In a doubtful case, depending either upon the law or the evidence, the Court will not interfere in this summary mode to take from the plaintiff the security he has obtained. But where the defect is apparent from the plaintiff's own showing, we take the rule to be otherwise.

The defendant assigned another cause for dissolving this attachment, which the Court does not think sufficient:—this was

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*Clark's Executors vs. Wilson.*

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the record of an attachment, sued out by these plaintiffs against this defendant, in the state of Maryland, for the same cause of action, with a *cepias* claim against the garnishee, who, it is sworn by the plaintiffs, has effects in his hands belonging to the defendant, and who, it appears by the sheriff's return, has been arrested. The mere pending of an attachment by the plaintiff against the defendant, for the same cause of action, in another state, affords no ground for dissolving this attachment, although that was the first laid; since the funds found in one state may be quite insufficient to discharge the debt. The case might be different, if the defendant had given bail on the first attachment, unless under very special circumstances, addressed to the sound discretion of the Court.

*This rule must be made absolute for dissolving the attachment.*

## CIRCUIT COURT OF THE UNITED STATES.

NEW-JERSEY, OCTOBER TERM, 1820, AT TRENTON.

BEFORE } Hon. BUSHROD WASHINGTON, Associate Justice of the  
          } Supreme Court.  
          } Hon. WILLIAM S. PENNINGTON, District Judge.

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### CASE OF LE TIGRE.

If an officer, acting as such, exceeds the bounds of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage. It is no objection to a claim for salvage, that the interference or assistance of the salvor, did not arise from a desire to preserve the property, or benefit the owner.

A mere intention to smuggle goods, will not authorize the seizure of a vessel.

*WASHINGTON, Justice*, delivered the opinion of the Court. This cause comes before the Court, upon an appeal from a *pro forma* decree of the District Court. The material facts in the case are as follow:—

Some time in the month of April 1819, the brig *Le Tigre*, with a valuable cargo on board, both of them belonging to a subject of his Catholic Majesty, was captured on the high seas by the *Constitution*; an armed vessel, manned and equipped in the port of Baltimore, and asserted to be commissioned by the government of Buenos Ayres, to make capture of the property of the subjects of Spain, between which countries open war

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Case of Le Tigre.

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was then, and still is existing. A prize-master and crew were put on board the Tigre, and she was ordered to Buenos Ayres. Being short of provisions and water, the prize-master determined to put into Margareta, and there to have the vessel and cargo condemned; but, as he swears, the crew compelled him to steer for the United States, for the avowed purpose of smuggling the cargo on shore. On the 3d of June, she arrived in Cape May Roads, within this district; and the prize-master reported the vessel to be in distress for water and provisions, and applied to the deputy-collector, Stevens, for permission to land a part of his cargo, and to dispose of it, for the purpose of obtaining the supplies he wanted; which, after a survey and report of her situation, was granted. On the 4th of June, the deputy-collector was informed by Bedwell, the prize-master, that his crew was in a mutinous state, and intended to put to sea, and to smuggle the cargo into the United States; and he was at the same time requested to take possession of, and detain her until he could hear from the agent of the owners in Baltimore. In consequence of this communication and request, Stevens, with seven or eight men hired by him for the purpose, boarded the brig and took possession of her, without encountering the slightest resistance from the crew, in whose conduct there appeared no indications of insubordination; so far from it, they, without objections, assisted the persons thus brought on board, to navigate the brig to the mouth of Cohansey creek; to which place she was ordered by Stevens, and where she arrived on the 5th of June. On the day after, the hired hands were discharged; but Stevens obtained possession of the brig until the 9th, when the prize-master made a formal assignment, in writing, of the vessel and cargo, to the collector, Mr. Westcott, the other claimant, by whose orders she was conducted to Bridgetown. On the 11th of June, the Spanish Consul filed a libel on behalf of the owners of the brig and cargo, for the purpose of obtaining restitution of the property, upon the ground of the illegal outfit within the United States. No



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claim having been interposed for the capture, a decree of restitution was pronounced by the District Court, upon the payment of one-fifth of the appraised value to Westcott and Stevens, for salvage, for which they had filed a joint claim. It is from this part of the decree, that the appeal was prayed; and the only question to be decided by this Court is, whether those claimants are entitled to any, or what compensation, by way of salvage?

Whether the account which Bedwell gives, of the mutinous behaviour of his crew, which he says compelled him to come to the United States, and of their threats to put to sea and smuggle the cargo into the United States, be true or not, may well be doubted; since he is flatly contradicted by most of his crew, who swear, that Bedwell came in voluntarily, and with a declared intention, after obtaining the supplies of which he stood in need, to put to sea, and to employ vessels to introduce the cargo into the United States. They positively deny the existence of a mutiny, actual or intended, either before or after the arrival of the brig in Cape May Roads. There are two facts, however, of which we entertain no doubt. The first is, that an intention *wholly* to introduce the cargo into the United States, was formed either by Bedwell or his crew, or by both.

2. That whatever might have been the designs of the crew, they had not, while the vessel lay in Cape May Roads, broken out into any overt acts; and the undisputed possession of the vessel was, to all intents and purposes, retained by Bedwell at the time when Stevens went on board with the persons hired to aid him in taking possession. We are also satisfied, that the vessel and cargo would have been carried to sea, either by Bedwell or by his crew, and would have been lost to the owners, but for the interposition of Stevens. If the facts thus assumed be correct, it is undeniable, that a meritorious service has been rendered to the owners; which in ordinary cases would entitle the persons rendering it, to an adequate compensation by way of salvage. But it is contended by the counsel for the

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Rebellant, that this case is not within the general law of salvage; because, the preservation of the property was not the direct object of the acts done by the claimants, but was incidentally the effect of an act performed by public officers, in execution of a public duty enjoined upon them by law; and this constitutes the great question in the cause. When the service for which the compensation is claimed by a public officer, is required of him by the law, *virtute officii*; or it becomes a duty, necessarily connected with his public employment; we can perceive the most obvious reason, why a compensation beyond what the law allows, should not be claimed from the owner of the property saved.

For services thus required, he is paid by the public, in the emoluments to which his office entitles him; and this the law may justly consider as a full equivalent. He deserves, and ought to receive no other reward, from the person for whose interest he acted; for, although the individual receives the benefit, the service is in reality rendered to the government, and not to the individual. The case of the *Aquila*, 1 Rob. 39, was that of a claim for salvage, made by a magistrate; who, in obedience to the requisitions of the Act of Ann, sect. 2, ch. 18, issued a warrant to a constable, to summon as many men as might be thought necessary, for the preservation of a vessel on the seacoast, from the danger of being stranded. The vessel and cargo were saved, by means of the persons so summoned; and the Judge was of opinion, that the claim of salvage was inadmissible, because the magistrate acted in discharge of his public duty; and not having exceeded what was required of him, in the ordinary discharge of said duty, he ought to be left to the general reward of all good magistrates—the fair estimation of his countrymen, and the consciousness of his own right conduct. In this case, it will be observed, that the law was imperative upon the magistrate, to issue the warrant for the express purpose of saving the property, and not for some other purpose, which might, nevertheless, have incidentally

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produced the same consequence. The magistrate had no choice, whether to perform the required act or not—his refusal would have been a breach of duty. Besides, the statute having provided a compensation by way of salvage, for the collector, and all others actually concerned in preserving the vessel, might reasonably be construed to have intended to exclude the magistrate.

The case of the *Bella Edwards* 46, was that of a transport, rescued from hostile capture, by the commander of a ship of war, of the squadron to which the transport belonged. The transport having been hired to the government, to aid in taking off the British troops from Corunna, was, *pro hac vice*, the property of the government, and under its protection. It was the duty of the ships of war to afford that protection; and, although the owner of the rescued vessel was benefited by the performance of this duty; still, as in the former case, the service was performed for the government, in the ordinary line of the duty of the officer of the saving vessel; and was, in fact, paid for by the government, as for any other service connected with his public official duty. Of this class of cases, is that of the pilot, who safely conducts into port, a vessel in distress at sea. He acts in the performance of an ordinary duty, imposed upon him by the law and the nature of his employment; and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment. *The Joseph Harvey*, 1 Robinson's Ad. Rep.

Salvage is allowed for the re-capture, by the conveying ship of one of the convoy, from the possession of the enemy; upon the principle, that the capture dissolved the connexion between the conveying vessel and the prize; and consequently, the former was under no obligation to make the re-capture. Any exertions which could have been made, to prevent the capture, could not have been a case of salvage; because the salvor acted in the line of his duty.

Whether the principle, to be deduced from the cases, is

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 Case of *Le Tyne*.
 

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strictly applicable to one, where the duty imposed upon the officer has for its object the public interest exclusively, distinct from that of the individual, may admit of some doubt. And, reasoning upon the general principles of *quantum meruit*, it would seem somewhat inconsistent with the nature of such a claim, that compensation should be allowed for a service professedly not intended, and should yet be withheld, when the salvor acted with a view to the interest of the person from whom the compensation is demanded. It may also be observed, that, in the above case, *Sir William Scott* does not appear to have been governed in his decision by any consideration of the official duty being directed to the interest of the individual whose property has been saved. It is not, however, our intention to give any opinion upon this point; because we have the authority of *Sir William Scott*, and, as we think, of good sense, for saying; that, if an officer, acting as such, exceeds the limits of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage. And we are of opinion, that these officers went beyond the ordinary limits of the duty which their official stations required from them.

We are aware of no law of the United States, which authorized the collector or his officers to seize and detain the *Tyre*, upon the asserted ground of an intention, in the master and crew, to smuggle the cargo on shore. The only section of the Duty law, under colour of which they could have so acted, is the 29th; and that merely requires the collector to arrest a vessel which *attempts* to depart from any district into which she has arrived, unless it be to proceed on her way to some interior district, to which she may be bound, before the master has made a report or entry of her cargo. But it will be perceived, that it is the *attempt to depart*, and not an intention to violate the revenue laws, which will justify a seizure under this section. Yet it is contended, by the counsel for the respondent, that an authority to prevent a violation of the revenue laws, by arresting the vessel, is *cause of well grounded suspicions*, which must

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necessarily reside in the collector, upon general principles of law, although it would not be granted to him expressly by statute. We think it will be pretty difficult to maintain this position; for let us ask of those who make it, what are the ulterior measures which they would propose to be taken by the collector consequent upon the result? It is most unquestionable, that no proceeding could be instituted against the vessel, upon the mere ground of an intended breach of laws, attended by no overt act of an illegal nature. If he may seize and detain her for one hour, without being able to bring her to adjudication, he may for just as long time as his suspicions of the evil designs of the persons on board shall continue;—a power, which, in its exercise, would or might be most inconvenient and oppressive to the owners of the property. In a case arising under the 38th section, the service is made on account of an offence actually committed;—the attempt to depart before an entry or report: and by performing either of these acts it would of course be removed. The collector might also put an officer on board to prevent smuggling; but he cannot detain her on that ground. We are, then, of opinion, that it was not the duty of the collector to take possession of this vessel, much less to carry her, out of the course of her voyage, up the river Delaware; upon the ground of a suspicion of an intended violation of the revenue laws of the United States. On the contrary, we think it perfectly clear, that the officer acted at his peril, and would be considered in the light of a trespasser, if he could not, as Stevens certainly may, justify his conduct, by pleading, that he acted as he did, at the express request of the prime-master and commander of the vessel. However the general principle of law then may be, we have no doubt, that, if a collector, or other revenue officer, intending to act in the line of his official duty, but mistaking the law, and transcending his authority, is the meritorious cause of saving property to the owner, he is not precluded, on account of the motive which actuated him, from claiming salvage; and that such was the

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present case. Two other objections have been made to this claim, which deserve to be noticed.—The first is, that the seizure of this property was not made with a view to save it from loss, or to benefit the owner; and that, consequently, the claimants have not the merit of salvors; nor are they entitled as such to compensation. 2. That, upon the fair construction of the 9th article of the Spanish Treaty, the property ought to be restored entire, free from every deduction. 1. As to the first of these objections, it might be a sufficient answer to say, that it is not supported in point of fact. It is expressly sworn, by Bodwell, that the seizure was made by the deputy-collector, at his request, and upon his representation of the mutinous conduct and unlawful intentions of the crew to put to sea, and to struggle the cargo on shore; and that he stated to Stevens, that his object was to have the *Tigre* detained, until he could hear from the agents of the owners of the privateer. If this be so, and the evidence stands entirely uncontradicted, it is fair to conclude, that, in making the seizure, and in detaining the vessel, Stevens was influenced by the double motive of preventing a breach of the laws, and also of rescuing the property from the destruction with which it was threatened, should the crew persist in their design. But we by no means acknowledge the soundness of the objection in point of law. The owner, whose property has been preserved from destruction by the acts of a stranger, has no right to inquire into the motives which influenced his conduct, provided he acted legally.

It is sufficient to entitle the salvor to a just compensation, that a beneficial service has been rendered, by which the property has been rescued from imminent danger. It is only in estimating the *quantum* of compensation, that considerations of this nature should be taken into account. The intention of the salvor may have been to appropriate the whole of the property to his own use; as where a vessel, captured as prize, turns out to be a mere case of salvage. "The re-captor," observes the Chief Justice, in the case of *Talbot vs. Seamen*, Cra. 36, "is

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seldom actuated by the sole view of saving the vessel. In no case has the inquiry been made."

2. The Spanish Treaty.—The 9th article declares, that "all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof."

The only question in this case is, whether the rescue was made from pirates or robbers? And this must be decided by the evidence in the cause. It is certainly a matter both of surprise and regret, that the fact of the national character of the Constitution, is left in so much doubt by the imperfect manner in which the evidence has been taken; for, it can scarcely be supposed, that if the prize-master and crew had been examined upon this point, they could not have given important information in respect to it. It is highly probable, that Bedwell knew whether she was built or owned in Buenos Ayres; and he must have known whether she had on board a commission from the government of that country or not. Yet his evidence is altogether unsatisfactory upon these points; nor is he even asked any question, by either side, calculated to throw light upon them.

If, then, the evidence as to the national character of the vessel, and her authority to make captures, be defective, how ought this circumstance to affect the question under consideration? We are of opinion, that it must operate against the party who alleges the fact, that the capture was piratically made. To the claim of salvage, for a rescue of Spanish property captured at sea as prize of war, by a vessel professing, at least, to be an enemy of Spain, the owner sets up the Spanish Treaty; which requires the restitution to be entire, provided the rescue be made out of the hands of pirates and robbers. He

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must therefore bring the case within the Treaty; and to do this, it is incumbent upon him to prove that the captors were pirates and robbers. What degree of proof would be sufficient to establish that fact, would be another question; but that the *onus* is upon him, can hardly, we think, be doubted. The evidence ought, at least, to be such as to lay a reasonable ground for believing, that the taking was piratical, so as to shift the burthen of proof to the other side. It might not be necessary, for example, that the owner should prove, that the vessel had no commission; and yet if the fact were so, it must have been within the knowledge of the prize-master, who was examined by both parties. If the capture were *prima facie* illegal, and it were proved that the Constitution was owned by a neutral, it would be sufficient to establish the fact of piracy; unless the claimants could show her to have been regularly commissioned. For, if she were, in fact, a Buenos Ayrean bottom, the capture would be legal, although she had no commission; and the only effect of the want of one would be, that the prize would be condemned to the government of Buenos Ayres, instead of the captors. But there could be no ground for the charge of piracy against the captors. Whether the evidence in this cause would be strong enough to prove the *legality of the capture*, if that were now the point of inquiry, need not be decided. It is sufficient to withdraw the case from the operation of the Treaty, that a piratical taking by the Constitution is not made out. The evidence, indeed, such as it is, would rather lead us to a different conclusion.

Amongst the papers found on board the ship, is one which purports to be the copy of a commission for the Constitution, with the signature of Puerydon, Supreme Director of the United Provinces of Buenos Ayres, dated at Buenos Ayres, with an endorsement by A. Micah, the original commander; authorizing Captain Broom to take command of the Buenos Ayrean brig of war Constitution, and to act as commander, conformable to the said commission of the Buenos Ayres government, and



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the owner or merchant of Buenos Ayres. Bedwell, in his deposition, speaks of her as a Buenos Ayrean national vessel; and he swears he sailed in her on a cruise to capture Spanish property. He also swears, that, after the capture of the *Tigre*, he was put on board of her as prize-master, with directions to carry her to Buenos Ayres, for condemnation; that his intention, when he left the *Constitution*, was to go to Buenos Ayres; and that he afterwards endeavoured to get to Margaritta, on account of his being short of water—where he intended to bring the property to adjudication; but that his crew compelled him to come to the United States. This evidence is strongly corroborated by the letter of instructions to Bedwell, found amongst the papers of the *Tigre*, seized by the commander of the *Constitution*, dated on board the Buenos Ayres brig *Constitution*, in which he is ordered to take the prize to Buenos Ayres, and is informed, that he will be entitled to an additional share, if he gets her safe. Now, taking this evidence altogether, it is difficult to resist the belief, that at least the *Constitution* belonged to Buenos Ayres, and was there owned. The papers above mentioned speak of her as such; and if she was so, we have already stated, that it is immaterial, whether she had a commission or not, so far as the question of piracy is involved in the case. If the *Constitution* was not a commissioned privateer, the whole property would have been condemned to the government of Buenos Ayres; and consequently, the promise to allow one share of the property to Bedwell, would have been made without authority. And if she was not only uncommissioned, but was in truth the property of a neutral, is it credible, that the prize would have been ordered or conducted to Buenos Ayres, or to the port of any other civilized country, for the purpose of adjudication; and thus to expose the property to confiscation, and the prize-master and crew to the danger of being tried as pirates? Upon the whole, we are of opinion, that the charge of piracy not

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being established, the case is not within the operation of the Spanish Treaty.

The only remaining inquiry respects the *quantum* of compensation to be allowed to the two claimants. This must depend upon the exercise of a sound discretion, after taking into view the damage from which the property was relieved, the risk run, and the labour employed in saving the property. We are fully satisfied, that, but for the interference of the claimants, this valuable property would have been lost to the owners. At the same time, we are of opinion that this is a case of very little merit. The rescue was made while the vessel was lying at anchor, within the district of the collector whose deputy made it, without the slightest personal danger, and with very little labour; for, although Bedwell's fears induced him to suspect his crew of mutinous intentions, yet it is most clear, that if even his suspicions were well founded, (and the contrary is proved by the crew;) still Stevens took possession of the vessel, not only without opposition, but without a murmur from the crew; she was, with little trouble, and no hazard, conducted to a place of safety, by persons employed by Stevens; and who appear to have been satisfied with a very moderate compensation made to them by the claimants. In making the seizure, no legal responsibility was incurred, not only because the act done to save the property was meritorious; but because it was performed at the request of the prize-master. This is a very different case from those of derelict, re-capture from the enemy at sea, rescue from mutineers, and the like. In general, these are attended with danger, either to the persons employed in the service, or to the vessel and cargo so engaged. We have looked into the cases; and find, that in some of them, though possessing a greater merit than this can boast of, a much lower rate of compensation, than is given in this case, has been allowed.

The case of the *Franklin*, 4 Rob., was that of a British vessel and cargo, captured whilst going into an enemy's port,

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whereby she was saved to the owners from inevitable destruction. The Court refused to allow military salvage, because the property was not captured from the possession of the owner;—but for the actual service rendered, a compensation, by way of salvage, was decreed, of about one sixtieth part of the appraised value, over and above expenses incurred. The case of the *William Beckford*, 3 Rob., was that of a rescue of a slave ship from insurgent slaves, and no salvage was allowed.

We regret that we have not an opportunity of looking into the American decisions upon this subject, to see what has been the usual rule allowed in cases resembling the present. But we are well satisfied, that these claimants will be amply rewarded for all the services which they have rendered to the owners of the *Tigre*, by allowing each of them 1000 dollars, over and above the sums paid by them to the persons employed to aid in seizing this vessel, and navigating her to Cohansey creek, together with any other reasonable expenses to which they have been put, in preserving the property; all which expenses, are to be ascertained by the Register of the Court. We shall allow the claimants their costs.

The sentence of the District Court is to be reversed, so far as it allows to the claimants one fifth of the property saved for salvage; and is affirmed in all other respects, reforming it as above.

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## HARRISON vs. ROWAN.

*Issue devisavit vel non.*

Where a testator has given a fee to A, if she should survive his daughter, dying without issue then living, A is not a witness in support of the will. A witness may depose as to what he thought of the testamentary act, at or about the time the will was made; but not as to what the witness had declared upon the subject to others.

Upon the cross examination of a witness, he may be asked leading questions, to draw from him a further disclosure than he made upon the principal examination, and in reference to the matter testified about. But not as to other matter.

The proceedings of the Orphans' Court, upon the offer of a will for probate as to personal property, and the refusal of the Probate Court refusing the probate, is not evidence upon this issue; and if the one party read part of a deposition, to show that a witness had contradicted himself, the other side may read the whole, to prove his consistency.

It is not necessary for the devisee to prove, that the will was read to the testator in the presence of the witnesses. In general, this is to be presumed; but if the testator was blind, or incapable of reading; or if a reasonable ground be laid for believing it was not read to him; or that there was fraud in the transmission; it is necessary for the devisee to satisfy the jury that the will was so read, or that the contents were known to the testator.

The testator should appear to have had a sound disposing mind and memory; that is, that he was capable of making his will, with an understanding of what he was doing.

A man may be capable of disposing by will, and yet incapable to make a contract, or to manage his estate. The question is as to competency when the will was made, though evidence of acts and sayings before is always admitted.

The evidence of attesting witnesses to the will is most to be regarded.

Where an issue of "*devisavit vel non*" is directed out of Chancery, in England, the practice is, for the Judge who tried the cause to return, with the verdict, his notes; and if the Chancellor is dissatisfied, on the ground of the admission of improper evidence, or the rejection of what was proper,

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or for other reasons, he still direct a new trial; but an exception can be taken, *at Nisi Prius*, in the opinion of the Judge who tried the case. In the Circuit Courts of the United States, if the Court is supposed to have erred in any of these particulars, the proper mode is to move the Court, sitting in equity, for a new trial.

THIS was an issue of ~~disputed~~ *testamentary* will, directed, by this Court, on its equity side, to try whether John Sinnicksen did make a valid and legal will, to pass his real estate? During the trial, the following points of ~~evidence~~ *evidence* were ruled by the Court:

1. The plaintiff offered to examine one of the daughters of Mrs. Dick, (now living,) in support of the will. An objection was made to the competency of the witness, on the ground of interest, it being contended, that she has a contingent estate in certain property comprehended within the following bequests; viz. "If my daughter, Sarah, live, and have issue living at her death, and if it shall also happen, that my son Beapies shall die without lawful issue, then I give to the issue of my daughter, in fee, ~~simple~~ *simple*. But if my said children shall have no such issue, then I devise the said farm to my sister, Sarah Dick, and to her heirs, ~~in fee simple~~, and if she shall not survive my said children, I devise the same to the heirs of the said Sarah, ~~in fee~~."

It was contended by the plaintiff's counsel, that Mrs. Dick took an estate in fee, and that the limitation over, to her heirs, was void; and consequently, that the witness had no other interest, than what an executrix had, which affords no objection to his competency.

*By the Court.* The ~~disposition~~ *disposition* of the will must be taken altogether; and every part of it should be carried into effect, if it can. The clear meaning of the testator, was to give a fee simple estate to Mrs. Dick; provided she should survive the daughter, dying without issue, then living. But if Mrs. Dick should die before the happening of such contingency, then the

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estate was to vest in the heirs of Mrs. Dick, as purchasers, by way of executory devise. The witness, therefore, has a contingent interest in supporting the will; which, we think, disqualifies her from being a witness.

2. A witness may be asked, what opinion he formed of the sanity of the testator, at or about the time of the will being made; but not what he said to third persons upon the subject.

3. Upon the cross examination of a witness he may be asked leading questions, to draw from him a further disclosure than was made upon the principal examination, and in reference to the matter testified about. But if the cross examination reveals new matter, leading questions cannot be asked.

4. The plaintiff's counsel having, upon the examination in chief, asked some questions respecting the sanity of the testator, is not, on that account, precluded from examining witnesses, to rebut the evidence of the defendant upon that subject; although it was irregular for the plaintiff, in the first instance, to give evidence of sanity. All that he has to do, is to prove the due execution of the will, according to the form prescribed by the statute. "Incapacity, or fraud, is the defence set up on the other side, which the plaintiff is then called upon to repel. Nevertheless, it would be too rigid to preclude the examination of his witnesses on that subject; because he had irregularly asked some questions respecting it, in the first instance.

5. The defendant offered to read the proceedings in the Orphans' Court, upon the offer of this will for probate, as a testament of personal estate; and the Court of the Prerogative Court, refusing probate.

This was objected to, and the following cases were cited, 6 Creuse, 10. 1 Ld. Ray. 744. 208. Pennmg. Rep. 47. In support of the evidence, was read the Act of Assembly, made in 1784; 3 Day Rep. 326. 1 Galfr. 623.

Pennington, J., stated, that, until the law of 1784, the jurisdiction of the ordinary was always considered, in this state, as

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Being similar to that of the Ecclesiastical Court in England, and confined entirely to testamentary personal estate. That the validity of a will, in relation to real estate, was open for decision of the Common Law Courts, upon a trial in ejectment, or upon an issue of descent, &c., directed out of Chancery. That the Act of 1784 made no alteration in this respect, and that it has always been so understood, and such has been the practice.

Washington, Justice, concurred in the opinion, that the evidence was inadmissible, for the reasons assigned by Judge Pennington.

6. If one of the parties reads part of a deposition, in order to prove that the witness who gave it contradicted what he has now stated upon his examination in Court, the other side has a right to refer to the whole deposition, to support the consistency of the witness.

For the plaintiff, it was contended, that it is not necessary to prove, that the will was read to the testator before the witnesses, even although the Statute required. 10 B. & P. 415. That capacity to make a will is always to be presumed, till the contrary is proved. 3 Johns 133. That the person who impeaches the will on this ground, must do so by proving facts, and not by the opinions of witnesses. Swab. 78. And that no extrinsic evidence of insanity is sufficient to prove mental incapacity. Swab. 111. 3 Vt. 44 pl. 8. 3 P. W. 700. Phil. Ev. 375. 1 Wash. Rep. 225.

That testimony to prove incapacity, given by the attesting witnesses, is to be cautiously received, as they are guilty of great misbehavior in having testified when their opinion was against the validity. 2 Mass. Rep. 280. Pow. on Dev. 700. That the question is merely as to a general testamentary capacity, and not a capacity in reference to the particular will. Pow. on Dev. 145. Swab. 79-80. Upon the subject of fraud, that

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no evidence, short of direct fact and circumvention is admissible;—not to be collected from circumstances. *Swint*, 10, 14, 3 T. Rep. 142. 3 *ab.* case 61. As to admitting evidence of declarations of the testator at other times, and leaving out of the will certain parts of the testator's property, 2 BL. 27. 209. 2 *Sim.* 428.

Cases cited for the defendant, *Southard's Rep.* 454. *Fow.* on Dev. 718. *Purke's Evid.* 204. *Barnes*, E. L. 213. 1 *Ford* 12, 114. *Swint*, 149.

WASHINGTON, Justice, charged the jury. This is an issue directed by this Court, sitting in Equity, to try whether John Stanishon made a valid will for disposing of his real estate; and this is the question which you are to decide, upon the evidence which has been laid before you.

The plaintiff holds the affirmative of this question; and all that he has to do, is to satisfy you that this will was executed in due form, according to the laws of this state. This he has done; and no question has been made at this time upon this point. But the defendant impeaches the validity of the will, upon the following grounds:—1. Want of testamentary capacity in the testator, at the time of his property transfer; and, 2. Fraud and circumvention practiced upon the testator by the person who drew the will. A third objection was made, by one of the defendant's counsel, which was, that the will is not proved to have been read over to the testator, in the presence of witnesses. We understand this to be made a substantive objection to the will, although it was not so argued by the other counsel on the same side, who very properly considered it merely as a badge of fraud, that it was not proved to have been read. We will, therefore, at once dispose of this point, by observing, that it is not necessary, in order to establish the will, that the person claiming under it, should prove that it was read over to the testator, in the presence of the attesting, or of other witnesses. It would be an unwise provision in the law, to re-



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quire this to be done, inasmuch as most men are careful to confine to their own breasts the manner in which they have disposed, or mean to dispose, of their property by will. The domestic peace and harmony of the testator's family might be very unhappily jeopardized, if publicity were necessary to be given on such occasions. The law presumes, in general, that the will was read by or to the testator.

But, if evidence be given that the testator was blind, or from any cause incapable of reading; or if a reasonable ground is laid, for believing that it was not read to him, or that there was fraud or imposition of any kind practised upon the testator, it is incumbent on those who would support the will, to meet such proof by evidence, and to satisfy the jury either that the will was read, or that the contents were known by the testator.

We now proceed to lay down some general rules, for assisting the jury in coming to a satisfactory conclusion upon the two points of capacity and fraud; and to notice some of the arguments at the bar, for the purpose of giving the sanction of the Court to such of them as we think are consonant with law, and our disapprobation of those which are not.

1. As to the testator's capacity. He must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged;—a recollection of the property he means to dispose of;—of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary, that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient, if he has such a mind and memory as will enable him to understand the elements of which it is composed—the disposition of his property in its simple forms. It is the business of the testator, to dictate the purposes of his mind; and of the scrivener, to express them in legal form.

In deciding upon the capacity of the testator to make his

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will, it is the soundness of the mind, and not the particular state of his bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business; as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will; and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions, than they would in comprehending business in some measure new.

The soundness of the testator's mind, is to be judged of from his conversation, or from his actions, at the time the will is made, or from both taken together. It is not sufficient, *per se*, that he should be able to describe his feelings, or to give suitable answers to ordinary questions. This he may do, and yet the mind may be too much diseased, to enable him to dispose of his estate with understanding and discretion.

It must also be remembered, that the fact of competency is to be decided by the state of the testator's mind, at the time when the will was made. And although evidence of the state of his mind, and of his bodily health, before and after that time, may be given, in order to shed light upon its condition at that period, still, such evidence is no otherwise to be regarded. For, although it should be proved, that at a prior or subsequent day, he was incapable of making a will from the effect of a temporary cause, such as fever and the like, it will not follow, that he was so when the will was executed.

In weighing the evidence of sanity, that of the attesting witnesses is most to be regarded; because it is more likely, that they should be attentive to the conversation and actions of the testator, than mere bystanders, who do not feel themselves particularly connected with the transaction. On the other hand,

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the subscribing witnesses are, in some instances, parties to it; and there are few persons so ignorant as not to know, that the sanity of the testator is essential to the validity of his will.

As to the subject matter of the testimony, it may be well to remark, that the mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing.

To this, as a general rule, the opinions of medical men, even although they did not see the testator, may be considered as an exception. A physician may, with some degree of accuracy, form an opinion of the nature of the disorder, and its probable effect upon the mind, where the symptoms are truly stated to him; because, from a long course of experience and observation, by himself and others of the profession, such have been the ordinary effects of these symptoms. But, to entitle such opinions to the regard of a jury, they should be satisfied by the other evidence in the cause, that the symptoms did exist, in the particular case under consideration. And if the opinions of these professional gentlemen, should differ materially; as to the ordinary effects of certain symptoms, the jury must weigh their evidence, as in other cases, and decide according to the opinion they may form of the comparative judgment, learning, and experience of the witnesses themselves. In this case, the physicians who have given testimony, have differed essentially from each other, in the opinions delivered to the jury; and there is no inconsiderable collision in the evidence of the other witnesses, respecting the material symptoms of the disorder; which, it is agreed on all hands, caused the death of the testator. It is proper to observe, upon this subject, that the opinion of the physician, who attended the testator during his last illness, is, for the most obvious reasons, always entitled to more regard than the opinions of physicians who had not this advantage.

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If the jury should be of opinion, that the testator was not competent to make his will, they will of course find for the defendant. If they should not be of this opinion, they will then inquire, 2dly, whether the will in question, was obtained from him by fraud, or circumvention of any kind.

It is contended, in support of the charge of fraud, that the testator is proved to have been for a long time in the habit of using spectacles; and that he was without them on the evening when his will was executed;—consequently, that he could not have read the will himself, after it was written; and that the evidence lays strong ground for believing, that the will was not read to him by the person who wrote it. It is further insisted, that the unnatural disposition, of so large a portion of the testator's estate, from an only and beloved daughter, to persons less nearly related to him, and this, in many respects, in opposition to previously formed resolutions, not shown to have been changed, and to declarations in proof of such resolutions,—and the bequest of a considerable property to the wife of the person who drew the will;—unitedly establish the charge of fraud and circumvention.

That these circumstances, if proved to the satisfaction of the jury, deserve their serious consideration, is unquestionable. For, although fraud is never to be presumed, yet it is not necessary to prove it by direct and positive proof. Fraud most commonly veils itself in mystery; and it is by circumstances only, that it can in general be detected and brought to light. It should, nevertheless, be recollected, that these circumstances should be so strong, when combined and examined, as to satisfy the jury of the existence of the fact they are adduced to establish. It will not do, if they affect the judgment with nothing more than doubt and suspicion.

The charge of fraud is repelled by the plaintiff upon the following grounds:—1st. That Mr. Harrison, who wrote the will, did not obtrude himself upon the testator, but was sent for, and confided in, by him, to perform this service, as he before had

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done other professional services.—That it was written by the direction of the testator, who acknowledged to the witnesses, that Mr. Harrison had not been officious in the business. 2d. That the testator declared, before the will was made, that he had arranged and digested the disposition of his property in his mind, and required only some person to commit it to writing. 3d. That Mr. Harrison was in the room with the testator for three or four hours, and had, therefore, abundant time to write and to read over the will to him. And lastly, that the testator, after signing the will, acknowledged to the witnesses that it was his will; and added, that he was perfectly acquainted with its contents; and being asked by Mr. Harrison who was to take care of it, he answered—"you, of course." Mr. Harrison is the sole executor and trustee of the whole estate. It is insisted by the counsel, and we think with great weight, that, if the testator knew what he was about, and was possessed of sufficient understanding to make a valid will, his acknowledgments to the witnesses, and his direction to the executor to take charge of the will, amount to strong and persuasive evidence that he was acquainted with its contents. Whether the grounds of the plaintiff's and defendant's arguments are made out by the proofs in the cause, you must decide. There is considerable contradiction in the testimony of the witnesses, on one side and on the other. It will be your duty to reconcile them as far as you can; and, in weighing evidence, to compare not only the credibility and characters of the opposing witnesses, but their judgment and opportunities of giving correct information respecting the facts they have related.

You are to say, whether John Simmickson had a sufficient capacity to make a testamentary disposition of his real estate, with discretion and understanding, at the time when this will was executed by him; and if he had such capacity, then, 2d, whether this is his will, or whether he was induced to execute and acknowledge the same by fraudulent practices, or imposition of any kind. If you find the first question in the negative,

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or the last in the affirmative, your verdict ought to be for the defendant; if otherwise, you should find for the plaintiff. In weighing the evidence, should you think it doubtful, or balanced, you ought to incline in favour of sanity, and against fraud.

*Verdict for plaintiff.*

The defendant's counsel tendered a bill of exceptions to the opinion of the Court, in rejecting the record of the sentence of the Prerogative Court, against the probate of this will, as a testament of personal property; and, also, to that part of the charge, in respect to the alleged necessity of proving that the will was read to the testator.

*Washington, Justice.* A bill of exceptions to the opinion of the Judge, who tries, at *Mot Prius*, the issue directed from the Court of Chancery is quite a novelty. The practice in England is, for the Judge to send to the Court of Chancery, with the verdict, the notes taken at the trial; and if the Chancellor is dissatisfied with the verdict, either because improper evidence was admitted, or legal evidence rejected; or because of the evidence given to the jury, or the opinions of the Judge at *Mot Prius*, he will direct a new trial, and sometimes set the verdict aside.

We see no reason, why the practice should be different, because the issue is tried by the same Court which directed the issue.

The only question will be, ought a new trial to be granted? And the evidence, and all the proceedings at law, being before the same Judges, it cannot be necessary, nor would it be proper, to present them for reconsideration and re-examination, in any other form, than on a motion for a new trial.

FINIS.

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### PRINCIPAL MATTERS.

#### ABANDONMENT.

What will be considered a delay of an abandonment, so as to affect the right to recover from the assurers. *Smith et al. vs. The Delaware Insurance Company*, 127.

#### ACTION.

Where a charter party had been entered into by one Smith and the defendant, although in the body of it he states himself the agent of Clark, yet, as all the covenants were made with Smith, and he executed the instrument in his own name, without reference to Clark, the action cannot be sustained in the name of Clark. *Clark's Executors vs. Wilson*, 560.

#### ADMINISTRATOR.

1. Defendant obtained letters testamentary from the Register's office in Philadelphia, to a supposed will of W. B., which, on an issue, was determined not to be the will of W. B. In relation to another supposed will, the same determination took place, and letters of administration to the estate of W. B., were then granted to the plaintiff. While the controversy as to the first supposed will was pending, the defendant took possession of the estate of W. B., and went on to administer the same, until the appointment of an administrator *pendente lite*, to whom the defendant delivered all the effects of W. B. *Bradford vs. Audinet*, 122.
2. The defendant having received letters testamentary on a will duly proved, was authorized to perform every act proper for an executor.

**ADMINISTRATOR.**

tor to do, notwithstanding the pendency of the question relative to the validity of the will. *Ibid.* 122.

3. The defendant was authorized, and it was his duty, (believing the paper to be the last will of W. B.) to support the first probate; and he is entitled to retain out of the estate, the expenses he was put to in that litigation; and also, the usual commissions for managing the estate while in his hands. There is no ground for considering the defendant an executor *de son tort*, in this case. *Ibid.* 122.

**AGENT AND FACTOR.**

1. This Court has always deemed it proper to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in plain terms, and free from ambiguity; and in this respect the same measure of justice has been dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States. *Lorraine vs. Cartwright*, 151.
2. Where an agent abroad, is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, stating the prices of the articles, and the amount of the charges on the shipments, the price stated in the invoice is the maximum by which the agent is to be governed. He has nothing to do with the actual cost of the articles. *Ibid.* 151.
3. If a consignee accepts a consignment, he does it on the terms prescribed by the shipper; he might have rejected it, but he cannot, after accepting it, refuse a compliance with the orders which accompanied it. *Ibid.* 151.

*Quere*, What will amount to a ratification of the unauthorized acts of an agent? *Ibid.* 151.

**AGREEMENT.**

1. If money is to be paid, or any other act to be done, on a certain day, and at a certain place, the legal time of performance is, the last convenient hour of the day for transacting business. But if the parties meet at any part of the day, a tender and refusal at the time of the meeting are sufficient. *Savery vs. Goe*, 140.
2. *Ibid.*, 1, 2.

**ALIEN ENEMY.**

1. Contracts made with an alien enemy, are lawful, if made in a trade carried on under license of the government, whether they arise

## ALIEN ENEMY.

directly, or collaterally, out of such licensed trade; or, if the enemy, with whom the contract is made, be in the hostile country by license of the government; or if the contract be a ransom bond. *Crawford vs. The William Penn*, 484.

2. Contracts made by prisoners of war, in the enemy's country, for subsistence, are binding. *Ibid.* 484.

## ASSUMPSIT.

1. This action being for a breach of contract, in not delivering teas of a certain quality, the plaintiff cannot be permitted to impute fraud to the defendant, by giving evidence tending to show, that after the examination of the teas made by the purchaser on shore, it was in the power of the defendant to change them. *Gilpin vs. Consequa*, 184.
2. In an action of assumpsit against the Collector of the customs, for a proportion of the proceeds of a forfeiture under the laws of the United States, to which the plaintiffs were by the provisions of the law entitled, the sum paid over and distributed to others entitled under the same law, to share the forfeiture before notice of the plaintiffs' claim, cannot be received. *Sawyer et al. vs. Smith*, 464.
3. Action on a bill of exchange, drawn by the defendant, in favour of the plaintiff, at New-Orleans, on J. B. of Philadelphia, in 1807. The declaration contained a special count, on a new promise made by the defendant in 1809, to pay the bill if he should ever be able, with an averment of his ability. To this count the defendant pleaded the Statute of Limitations. *Craig vs. Brown*, 503.
4. Where a promise has been made to a person, who was not the agent of B., and had no authority from him to pay a debt due to B., in a different manner from the original contract, and B. is not present, and does not accept the promise, B. cannot afterwards institute a suit upon the engagement. *Ibid.* 503.
5. Where a promise is made to pay a debt when able, and the creditor does not wait, but proceeds immediately in the original obligation, before the defendant had ability to pay, he cannot afterwards resort to the promise of payment when able. *Ibid.* 503.

## AVERAGE AND CONTRIBUTION.

1. The schooner Julia, on her voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, he, with the advice of the officers and crew, ran her on shore at Long Branch, in New-Jersey; and be-

## AVERAGE AND CONTRIBUTION.

- fore the enemy could board her, a large part of the cargo was saved; after which she was burnt. The master claimed to retain the goods saved, as subject to *freight, general average*, and expenses. *Caze et al. vs. Reilly*, 298.
2. The Rhodian Law *de jactu*, is the parent of the law of maritime contribution. *Ibid.* 298.
  3. The principle to be deduced from the Rhodian Law, and from the general maritime law of nations, is, that if the cargo or ship, or any part of either, be *voluntarily* sacrificed, or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made be attained. *Ibid.* 298.
  4. An intention to consign to inevitable loss goods thrown overboard, forms no part of the reason assigned by the Rhodian Law for contribution; and is not necessary to authorize the claim. *Ibid.* 298.
  5. The object always is, to incur a partial loss, and to risk a minor or contingent danger, to avoid the more probable or certain loss of the whole. *Ibid.* 298.
  6. It is sufficient to justify a claim to contribution, if the danger sought to be avoided be so imminent, that the measure adopted may be beneficial to all. *Ibid.* 298.
  7. If the exposure of the vessel be made for the common safety, and be successful in relation to a part of the cargo, it is immaterial whether her total loss was produced immediately by the stranding, or consequentially, by placing her in a situation which effected her destruction. *Ibid.* 298.
  8. If the ship be lost, there can be no contribution, because the object for which the jettison was made was not attained. In case of a general shipwreck, there can be no contribution, because it was not voluntary. *Ibid.* 298.

## BANKRUPT AND BANKRUPTCY.

Insolvent laws.

## BILLS OF EXCHANGE.

1. Exchange is to be settled at the rate prevailing at the time of the verdict. *Cropper vs. Nelson*, 125.
2. A bill of exchange, drawn at New-Orleans, upon a person residing in Philadelphia, and payable in the latter city, had a view to the laws of Pennsylvania, and the claims of the holder of such a bill will be subject to those laws. *Golden vs. Prince*, 313.
3. A bill of exchange be drawn by A, with directions to charge the

## BILLS OF EXCHANGE.

amount thereof to B, and it is accepted generally, and paid, the drawer is not liable to the drawee, unless it appear that B was the agent of A, and the direction to charge the bill to him, was only to point out the fund from which the bill was to be paid. *Bell vs. Davidson*, 328.

4. If a debtor remit a bill to his creditor, in payment of the debt, and he receives it as such, and credits the debtor, it is a payment; and he can only sue the debtor as an endorser; and if he neglect to present it in time for acceptance and payment, and to give notice of its dishonour, he makes the debt his own; whether the drawer has funds in the hands of the drawee or not. *Edmonston et al. vs. Embrie*, 396.

## BILLS OF LADING.

Evidence, 4.

## BOTTOMRY BONDS.

1. Insurance, 1.

2. Libel on a hypothecation bond, executed by the former master of the vessel at Calcutta, the Aurora being about to proceed to Philadelphia. The captain chartered the vessel to the libellant, for the voyage to Philadelphia, under another master; and at the same time executed the bond, part of the consideration of which was to obtain funds for the payment of a hypothecation of the vessel at Port Jackson, (of the necessity of executing which, there was no proof,) and part for repairs to be made of the vessel at Calcutta. *Walden vs. Chamberlain*, 290.

3. The payment of the hypothecation given at Port Jackson, is not a valid consideration for the bond executed at Calcutta, as there is no proof of the necessity for executing it. *Ibid.* 290.
4. The obligee in a bottomry bond ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage: the necessity for such advances, and that they were made on the credit of the vessel, are never to be presumed. If the master has or can command other funds, he has no authority to subject the property of the owner to the payment of a premium beyond legal interest. *Ibid.* 290.
5. Another conclusive objection to the validity of this bond, is, that before the advance was made and the bond given, the master had resigned his command of the vessel, and another master, appointed by the libellant, had succeeded to it. *Ibid.* 290.
6. The master of an American vessel, in an enemy's country, may

## BOTTOMRY BONDS.

- hypothecate the vessel, for money advanced to return to the United States; though the original voyage was broken up by capture and the compulsory sale of the cargo. *Crawford vs. The William Penn*, 484.
7. In a libel on a bottomry bond, the libellant is always expected to prove, by other evidence than the bond, that the money was lent, and that the repairs were made, and materials were furnished, to the amount claimed; and that they were necessary to enable the vessel to perform the voyage, or for her safety; and that the money could not be otherwise obtained. He should exhibit an account of the items, for which the funds were expended, with the usual proof, that the Court may judge of their necessity. *Ibid.* 484.

## CANTON CONTRACTS.

1. Evidence, 9, 10, 11, 12, 13.
2. Contract, 3, 4, 5.

## CHANCERY PRACTICE.

1. It is no reason, for referring accounts back to the commissioner, who made the report, that one of the parties suggests, that since it was made, he has obtained evidence in support of his exceptions; and that he expects he will be able to discover new debts and credits, not now known to him. The new evidence may be read, when the exceptions are argued. *Camac vs. Francis*, 108.
2. Under special circumstances, as if the defendant in a bill for an injunction be merely nominal, the Court will, on the application of the party really interested, though not a party on the record, direct the answer of the nominal party to be taken under a commission; and notice of such an application to the Court, is not necessary. *Willins vs. Jordan*, 226.
3. Notice of a motion to dissolve an injunction must be given, unless the cause has been set down for dissolution, in a reasonable time before the motion is made. *Ibid.* 226.
4. Where leave is given to amend the bill, it should state only so much of the original bill, as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill. *Peirce et al. vs. West's Executor*, 354.
5. The amendment should be by a separate bill, and not by interlining the original bill. *Ibid.* 354.
6. The amended bill should call on the original defendants to answer the new matter, or on the new parties, if any, to answer both. *Ibid.* 354.

## CHANCERY PRACTICE.

7. If the bill alleges a particular fact, the plaintiff cannot, in argument, urge that the fact is otherwise. He is bound by his admission; unless, before the hearing, he obtains leave to amend. *Prevost vs. Gratz*, 434.

## CITIZENSHIP.

1. Citizenship, when spoken of in the Constitution, in reference to the jurisdiction of the Courts of the United States, means nothing more than residence. *Lessee of Cooper vs. Galbraith*, 546.
2. If a citizen of one state thinks proper to change his domicile, and to remove with his family, if he have one, to another state, with a *bona fide* intention to reside there, he becomes instantly a citizen of that state, and may sue in the Courts of the United States as such. *Ibid.* 546.

## CIVIL LAW.

Pleas and Pleading, 7, 8, 9, 10.

## COLLECTOR OF THE CUSTOMS.

1. In an action against the collector of the customs for refusing a clearance, upon a count, stating that the plaintiff was the owner of the vessel—laden with a cargo, of a certain value, the allegation is sufficient, as to ownership of the cargo. *Bass et al. vs. Steele*, 381.
2. The general nature of the cargo, being provisions—the blockade of the river Delaware, by the enemy, and a license to the plaintiff, being neutrals in the war, from the blockading squadron, will not authorize the collector to refuse a clearance; there being no law to authorize such refusal. *Ibid.* 381.
3. If the owner contemplated an illicit intercourse with the enemy—such as to supply him with provisions, the clearance of the vessel might be withheld by the collector. *Ibid.* 381.
4. The collector must show probable cause for his suspicions; and if the party, having it in his power to remove the suspicions by evidence, fails to do so, he is not entitled to damages for the refusal of the clearance by the collector. *Ibid.* 381.

## COMMISSION.

If the general interrogatory is not answered, by a witness examined under a commission, it is fatal to the deposition. A witness cannot be asked, if the facts stated in an *ex parte* certificate are true; he should be interrogated as to those facts particularly. *Richardson vs. Golden*, 109.

## CONSTITUTIONALITY OF STATE LAWS.

1. The exercise of the power by the state governments, to pass Bankrupt and Naturalization Laws, is incompatible with the grant of a power to Congress, to pass uniform laws upon the same subjects. *Golden vs. Prince*, 313.
2. The omission of Congress to pass a Bankrupt Law, does not authorize the several states to pass such laws; but the omission of that body to pass such a law, is, in effect, a declaration that there ought not to be such a law. *Ibid.* 313.
3. Insolvent Laws.
  4. A law which authorises the discharge of a contract, by the payment of a smaller sum, or at a different time, or in a different manner than the parties have agreed, impairs its obligations; by substituting for the contract of the parties a legislative contract, to which they never assented. Such is the law of Pennsylvania of 13th of March 1812; and as such, it is unconstitutional and void. *Golden vs. Prince*, 313.
5. It seems to be a safe rule, that where an unqualified power is granted to the general government to do a particular act, the exercise of which, by the state governments, would be inconsistent with the express grant, the whole of the power is granted, and consequently, vests, exclusively, in the general government. The state governments cannot, in that case, exercise it, without showing an express grant; or that it is fairly deducible from the circumstance in which or where the claim is founded. *Ibid.* 313.

## CONSTRUCTION OF STATUTES.

1. Embargo, and Embargo Laws, 1.
2. Offences against the laws of the United States. *Passim*.
3. Non-Intercourse Laws, 2, 3.
4. The 29th section of the Act of Congress, for punishing certain crimes, passed April 30, 1790, which requires a list of the witnesses to be delivered to the prisoner, three days before the trial, is confined to treason; nothing more being required, in any other capital offences, than the delivery of a copy of the indictment, and a list of the jurors. *The United States vs. William Wood*, 440.

## CONTRACTS.

1. The law of the country where a contract is made, is the law of the contract, wherever performance is demanded; and the same law which creates the charge, will be regarded, if it operate a discharge of the contract. *Green vs. Sarmiento*, 17.



CONTRACTS.

2. At what time money is to be paid, when a particular day has been stipulated for its payment: *Savary vs. Gee*, 140.
3. The examination made by the supercargo, of a sample chest of tea, and his having approved of it; do not prevent the claim of the plaintiffs to indemnity, if the teas delivered were not of the quality contracted for. *Gilpins vs. Consequa*, 184.
4. To ascertain the amount of the indemnity to which the plaintiffs are entitled, for the breach of a contract to deliver teas of a specified quality, the rule is, to consider the sales of the teas at the market where they were disposed of, and compare them with the sales of other teas, not as furnishing the *amount*, but the *rate*, of the loss; and to apply this *rate* to the prices of the articles of the first quality at Canton; and in the absence of other evidence, the prices agreed on in the contract may be taken. *Ibid.* 184.
5. No claim to the supposed loss, by the difference of exchange, can be sustained. *Ibid.* 184.
6. Alien enemy, 1, 2.

COVENANT.

1. Action of covenant, upon an agreement under seal, entered into in 1804, in which the defendant bound himself to pay to the plaintiff two notes of 1250 dollars each, and an unliquidated demand, when it should be liquidated, forthwith; after the defendant should obtain, or be in a legal capacity to obtain the lawful possession of the Georgia lands conveyed by him to E. G. The declaration averred, that on, and ever since the 1st of May 1806, the defendant was in the legal capacity to obtain, &c.; and, on this, issue was joined. *Bleeker vs. Bond*, 529.
2. Until the defendant was in the legal capacity to obtain possession of the lands, the plaintiff's claim was suspended; and, as soon as the capacity existed, the plaintiff's right accrued; although the defendant did not choose to obtain, or endeavour to obtain the possession. *Ibid.* 529.
3. The mortgagee of the defendant, as the agent of the defendant, having received, from the United States, compensation for the lands conveyed to the defendant, by E. G.; and he having conveyed the land to the United States, they being part of the Yazoo lands; the defendant is estopped thereby, from denying his legal capacity to obtain possession of the lands. *Ibid.* 529.

COURTS OF THE UNITED STATES.

1. A judgment at law, in the Circuit Court of the United States, of  
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## COURTS OF THE UNITED STATES.

Kentucky, is not conclusive on the Circuit Court of another state, sitting in equity, as the same would not be conclusive on the Circuit Court of Kentucky; as the principles and rules of a Court of Equity, differ from those which prevail in a Court of Law. *Bryant vs. Hunters et al.* 48.

2. The laws of the several states, constitutionally passed since 1789, are binding on the Courts of the United States, held within the state in which the same prevail. *Golden vs. Prince*, 313.

3. *Aliter*, as to rules of practice. Every Court possesses the power of making its own rules of practice, unless forbidden by law; and the 17th section of the Judiciary Law, vests, expressly, this power in the Courts of the United States. *Ibid.* 313.

4. Where the record of a judgment in the Circuit Court, has been sent to the Supreme Court, and an appearance entered there, by the defendant in error; and a decision by the Supreme Court, reversing the judgment, and remanding the cause for a new trial; the defendant in error cannot object, that the judgment, in this cause, is in force, and unreversed, upon the ground, that no writ of error had been sued out. *Evans vs. Eaton*, 443.

5. The petitioner was arrested by the marshal of the District of Pennsylvania, under an attachment from the Circuit Court of Rhode Island, for a contempt; in not appearing in that Court, after a motion served upon him in the state of Pennsylvania, to answer in a prize cause, as to a certain bale of goods condemned to the captors, and which had come into the possession of Peter Graham, the relator. *Ex parte Peter Graham*, 456.

6. The Circuit and District Courts of the United States, cannot, either in suits at Common Law or Equity, send their process into another district; except where specially authorized so to do, by some Act of Congress. *Ibid.* 456.

7. The same restrictions as to proceedings in prize causes, exist, not only by the express provisions of law, but also by the principles which apply to prize causes in this country, in England, and elsewhere. *Ibid.* 456.

## CRIMES.

If many go to do an unlawful act, and one only do it, all are principals. But, if they go to do a lawful act, as to visit a vessel to ascertain her character, and all but one commit a felony, though in his presence, but without his participation, their crime is not imputable to him. *The United States vs. Jones*, 289.

**DAMAGES.**

Contracts, 4.

**DEED.**

A deed to A, in consideration of a sum of money paid, or secured to be paid; in the usual form of a deed of bargain and sale, is to be considered as a conveyance executed; notwithstanding a covenant by the grantor, "to make a patent," which can only mean, to obtain one, and deliver it to the grantee. *Lessee of Willis vs. Bucher*, 369.

**DEVIATION.**

1. An insurance was effected on the cargo of the *Actress*, from New-York to New-Orleans; and after she passed Havana, she returned to that port, on the plea of a deficiency of water, when, by order of the government, the cargo was landed and put into the custom-house stores; the vessel not being permitted to depart with her cargo. The American consul sold the cargo, and the plaintiff claimed, in this suit, to recover the amount of the loss sustained by the sale.

If the necessity produced by the want of water really and fairly existed, a sufficiency for the voyage having been taken on board at New-York, and Havana was the nearest port—a deviation was justifiable. *Wood et al. vs. The United States Insurance Company*, 201.

2. What will be deemed a deviation from the voyage insured; and under what circumstances a vessel may proceed to a port, out of her direct course; and for what causes she may remain at such port. *Cole vs. The Marine Insurance Company*, 159.

**DEVISE.**

1. Where, in a will, a power has been given, and there has been a complete execution of it, and something added which is improper, and inconsistent with the purpose of the power, the execution is good, and the excess is void. *Warner & Wife vs. Howell & Wife*, 12.

2. After, if the boundaries between the excess and the execution, are not distinguishable. *Ibid.* 12.

3. Courts always lean in favour of the execution of the power, if it can be supported, even if it should disappoint the person executing the power. *Ibid.* 12.

4. Construction of a bond given before marriage to trustees, in the nature of a marriage settlement; and of the will of the obligor, devising real estate to his wife, which was held to be an execution of the stipulations in the bond. *Bryant vs. Hunters et al.* 48.

## DEVISE.

5. It is a general rule, that a devise of *land*, is not a satisfaction, or part performance of an agreement to pay *money*. *Ibid.* 48.
6. There is no principle of law, which will subject the real estate of the *creditor*, in the hands of his devisee or heir, to satisfy the representatives of the personal estate of the same creditor. *Ibid.* 48.
7. A devise to A, and if he die without heir or issue, the estate to go to B, his brother; gives an estate tail to A, by implication. *Willis's Lessee v. Dwyer et al.* 369.
8. Certain expressions in a will, showing an intention to dispose of his whole estate, may often enlarge an estate, which would otherwise be for life only, into a fee; as a devise to A, "freely to be possessed and enjoyed;" for here the implied intention is not inconsistent with the declared intention. But if real estate be given to A, expressly for life; or in tail, either expressly, or by clear implication; there are no instances where such estates have been converted into a *fee simple*, by words of doubtful import, used in either. *Ibid.* 369.
9. The law never unnecessarily creates an executory devise; unless where the testator's intention would otherwise be defeated. *Ibid.* 369.

## EJECTMENT.

1. Lands and Land Titles.
2. Limitation.
3. A party cannot set up a title to land by settlement, prior to the day stated for the commencement of his settlement, in the warrant issued to him for the land; but he may prove the land was never in the possession of the party who claims it from him by right of settlement. *Wells's Lessee v. Wright et al.* 250.
4. A survey made by order of the Board of Property, merely to mark the boundary of land claimed by the person for whom it is made, and not in execution of a warrant issued for the land, is not such a survey as will give title. *Ibid.* 250.
5. The return of the marshal of the service of a declaration in ejectment, stating, that he had shown it to one defendant, and delivered a copy of it at the dwelling house of the other, in the presence of his wife, is not sufficient; as a copy should have been left at the dwelling of both defendants, and the notice should have been read or explained by the marshal, and the return should have stated, that the defendants were tenants in possession. If all the defendants in ejectment inhabit the same house, and this appears by

## EJECTMENT.

the marshal's return, it is sufficient to deliver one copy. *Campbell's Lessee vs. Harper et al.* 356.

6. An affidavit of service is only necessary, where the service is not made by an officer of the Court. *Ibid.* 356.
  7. Where a rule on the tenant in possession can be taken, and the effect of a judgment under such a rule. *Ibid.* 356.
  8. A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate. *Lessee of Foster vs. Joice*, 498.
  9. When the defendant, in an ejectment, opposes to the plaintiff's title a superior and outstanding title in a third person, under whom he does not claim, it must be *subsisting and available*; and on which the asserted owner might recover in ejectment, if he was plaintiff. If such a title is barred by the Statute of Limitations, or by a descent cast, the defendant cannot avail himself of it, to protect his mere possession; he being a perfect stranger to the title. *Ibid.* 498.
  10. Ejectment for a tract of land purchased at a sheriff's sale, under a *condemni exposita* against the defendant.
- The plaintiff in ejectment must show a legal right to entry in general; and unless under special circumstances, the defendant should be let in, to prove the title an equitable one. *Lessee of Cooper vs. Galbraith*, 546.
11. No person can recover or defend himself against his own grant or covenant; nor can any one controvert, against his own acts, though not by deed, a title which he has thus acknowledged. *Ibid.* 546.
  12. In an ejectment by a *second mortgagee*, against the mortgagor, the latter cannot set up the title of the *first mortgagee*. *Ibid.* 546.

## EMBARGO AND EMBARGO LAWS.

1. Where a bond had been taken by the collector, by which the obligor stipulated to re-land a cargo, on board a particular vessel, in the United States, although the same might be prevented by the perils of the sea; and stipulating that a certificate of the landing of the cargo should, within a limited time, be delivered to the collector of the port of Philadelphia, to whom the bond had been given; the Court held the bond void, the Embargo Laws not authorizing the insertion of such stipulations. *The United States vs. Morgan et al.* 10.
2. Debt on a bond given under the Embargo Laws. The question on the evidence was, whether the defendants were prevented by *perils of the sea*, from performing the condition of the bond. It was

**EMBARGO AND EMBARGO LAWS.**

alleged, that the vessel was, by perils of the sea, driven into St. Thomas; and that when there, the authorities of the island obliged the master to sell her cargo. *The United States vs. Mitchell et al.* 95.

3. The rule, in the *United States vs. Dixey et al.* (*ante* page, 15.) condemned by the Court. If the vessel was not seaworthy, the injury done to her or to her voyage by perils of the sea, will not excuse the defendants, who should clear themselves from all imputations of this kind; but the rule as to seaworthiness, ought not to be more strict in such cases as this, than in cases of insurance. It is sufficient, if the vessel were seaworthy for the voyage upon which she was destined; and the want of this, must be proved by him who affirms the fact, if sufficient causes for her disability, such as storms, &c., are proved. *Aliter*, if no such cause appears. *Ibid.* 95.

**ESTATES TAIL.**

The provisions of the Insolvent Laws of Pennsylvania, passed in 1799, do not extend to estates tail, so as to make a conveyance, executed according to that law, operate as a bar to an estate tail. *Wilks's Lessee vs. Bucher et al.* 369.

**EVIDENCE.**

1. A testamentary declaration of the captain of the vessel, not under seal, taken at Chagres, on the Spanish Main, by the governor *pro tempore*, who is also a judge authorised to take such declarations, there being no notary, and proved to be an original paper, in the usual form, there being no seal at Chagres; was admitted in evidence. *Blagg vs. The Phoenix Insurance Company, &c.*
2. It is no objection to the testamentary declaration being given in evidence, that it contradicts other written papers signed by the captain. *Ibid.* 5.
3. The rule in *Walton vs. Shelly* is not authority in the United States, the case having been decided since the Revolution; and that rule has, since the decision, been much shaken, and it has been held to extend only to negotiable papers. *Ibid.* 5.
4. The bill of lading, and the invoice, are the ordinary evidence of property; but they may be contradicted, both as to their genuineness and authenticity, and as to their truth. *Ibid.* 5.
5. The declaration stated, the writ on which the plaintiff was held to bail in 6000 dollars, to have been returnable the first Monday in December 1809; whereas it was returnable the first Monday in March 1809: held, that the record does not support the declara-

## EVIDENCE.

tion, and cannot be given in evidence to support the count in the declaration for damages for the civil action, and holding to bail, but it may be used as evidence of malice, on the other counts. *Mynns vs. Dupont et al.* 31.

6. A letter from P. which went to show the plaintiff had not seduced him from the service of the defendants, was not admitted in evidence, as the testimony of P. might have been obtained. *Ibid.* 31.
7. A joint commission to take a deposition must be executed by all the commissioners, although the commissioner named by the party against whom the witness is offered, after proceeding some length in the examination, withdrew, and refused to complete it. *Ibid.* 31.
8. Papers taken from the person of the party, by the alderman before whom he was brought upon a criminal charge, the parties making the charge having no agency in taking the papers, may be read in evidence by those who have possession of them, having received them from the alderman. *Ibid.* 31.
9. The subscribing witness to a paper, who stated that he was called in to sign the paper as a witness, but did not see the parties execute, or acknowledge it, although they both told him it was their agreement, was admitted to testify. *Ibid.* 31.
10. The certificate of the governor of St. Thomas, (the signature being proved,) without a seal, given at the time the captain petitioned for leave to depart with his cargo, that such petition was refused; is an official act by a person, who, it is probable, would not give a deposition, and is different from evidence of matters not official, and may be read in evidence. *The United States vs. Mitchell et al.* 95.
11. The log-book was allowed to be given in evidence, in proof that the bills of lading had been made out from it; the witness declaring he was perfectly sure it was the log-book kept on the voyage, although he did not recollect having seen the mate make regular entries in it; and also, that every exertion had been made, to procure the attendance and testimony of the mate. *Ibid.* 95.
12. A person who had been convicted in the Court of this state, of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness. *The United States vs. Bockius*, 99.
13. If incompetency, produced by the conviction of a witness, depends on the punishment, and not the nature of the offence, yet where an infamous punishment, in the discretion of the Court, is not added, there is no disqualification, because it might have been in-

## EVIDENCE.

flicted. Fine and imprisonment is not an infamous punishment. *Ibid.* 99.

14. Commission, 1.

15. The defendant offered in evidence, a receipt for money, to prove the same to have been paid by C. W. to the plaintiff, on account of the defendant. The Court refused to permit it to be read, as C. W. might, and ought, to have been examined, to prove that the money was paid by him, on defendant's account. *Jordan vs. Wilkins*, 110.

16. In an action on a bill of exchange, brought by the endorsee of the second endorser, against the payee, who had endorsed the bill to the plaintiff; the plaintiff's endorser cannot be a witness to prove that the bill belongs to him. *Cropper vs. Nelson*, 125.

17. Upon the plea of *nil til record* to debt, on a judgment in another state, the seal of the Court must be annexed to the record itself; and it is not sufficient, that it is annexed to the certificate of the Judge of the Court, authenticating the attestation of the clerk who certifies the record. *Turner vs. Waddington*, 126.

18. The invoice, stated, in the record of the condemnation of the vessel insured, to have been found on board, at the time of capture, and the answers of the mate, to the standing interrogatories, were admitted in evidence, on the part of the defendants. *Azuria et al. vs. The Insurance Company of Pennsylvania*, 177.

19. Debt on bond, conditioned for the delivery of a good and lawful title to land in Virginia; to which the defendant pleaded performance. The surveyors of the county, who officially know that certain lands are covered with prior surveys, are competent witnesses to prove the same. *Jones vs. Backe*, 199.

20. A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys. *Ibid.* 199.

21. The certificate of the Collector of Havana, under the seal of his office, of the arrival of the vessel at that place for water, and that before permission to take it on board was given to the captain, he was obliged to stipulate that the cargo should be landed, the articles composing it being wanted for the use of the place—is not evidence, as the deposition of the Collector to these facts should have been taken. *Wood et al vs. The United States Insurance Company*, 201.

22. Although the usual evidences of property in a vessel, are the register and bill of sale, if there be such papers, and in the cargo, the



EVIDENCE.

- invoices, bills of lading, &c., yet, that other evidence may be admitted. *The United States vs. Jones*, 209.
23. A party cannot discredit his own witness, by proving, that on a former occasion, he swore differently from what he has now sworn.
24. *Quere*, Whether, under some circumstances, there be not an exception to this rule. *Ibid.* 209.
24. It is no objection to the testimony of a witness who deposes to general reputation of pedigree, that he is not one of the family, or intimately acquainted with it. *Barent & Wife's Lessee vs. Day*, 243.
25. The deposition of a witness, now dead, as to pedigree, may be read for that purpose only; though it was taken in another cause, between other parties, and on a different subject. *Ibid.* 243.
26. A deposition taken under a rule of Court, and sworn to before a justice of the peace, may be read: the provisions of the Judiciary Act refer to depositions taken without such rule. *Ibid.* 243.
27. A witness whose deposition has been taken *de bene esse*, must be proved to have been served with a subpoena, and is unable to come; unless he is so old, and generally so infirm, that his attendance could not be expected: the age of 65 is not of itself sufficient to entitle it to be read. *Ibid.* 243.
28. A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read. *Ibid.* 243.
29. A genealogical table, certified under the seal of a foreign officer, is not evidence. *Ibid.* 243.
30. The contents of a receipt said to have been signed by one of the defendants, or the manner of signing it, cannot be given in evidence—the receipt should be produced. *Romayne vs. Baines*, 246.
31. Character being put in issue in this cause, the plaintiff may give evidence of his character, before it is attacked by the defendants. *Ibid.* 246.
32. The laws of the several states, as to the practice and proceedings in their Courts, are not obligatory on the Courts of the United States; and therefore, the Act of the Assembly of Pennsylvania, of 2d January 1815, as to copies certified by a notary public, is not applicable in this Court. *Bell vs. Davidson*, 328.
33. All proper interrogatories must be answered on both sides, or the deposition cannot be read. *Ibid.* 328.
34. If the interrogatories are hypothetical, and in a certain event only are required to be answered, which event does not happen; or if

## EVIDENCE.

they refer to records, which ~~are not~~ ask for themselves; they need not be answered. *Ibid.* 328.

35. If the defendant relies upon the side of the plaintiff's account, to establish his claim, he admits, *prima facie*, the debit side of the account; provided it be composed of items, which, by the form of the action, may be recovered. If the form of action is not such, he may use the credits to defeat or diminish the credits obtained by the defendant, when one can legally be opposed to the other. *Ibid.* 328.
36. The entry in the books of the land office, that the balance of the purchase money was paid by the person "to whom the patent had issued," is evidence that a patent did issue; although the patent is not produced. *Willie's Lessee vs. Bucher et al.* 369.
37. The register of a vessel is not, *per se*, evidence of ownership. *Bar et al. vs. State*, 381.
38. When one party in a cause wishes the production of papers, supposed to be in the possession of the other, he must give to him notice to produce them. If they are not produced, he may give inferior evidence of their contents; or may draw inferences from their non-production, favourable to the other side. But if it is his intention to nonsuit the plaintiff—or if the plaintiff, requiring the papers, means to obtain a judgment by default, under the 15th section of the Judicial Act; he is bound to give the opposite party notice, that he shall move the Court for an order upon him, to produce the papers; or, on failure to do so, to award a nonsuit or judgment, as the case may be. *Ibid.* 382.
39. No advantage can be taken of the non-production of papers, unless ground is laid, for presuming that the papers were, at the time the notice was given, in the possession or power of the party; and that they are pertinent to the issue. In either of the cases, the party to whom the notice was given, may be required to prove, by his own oath, that the papers are not in his possession or power; which oath may be met, by contrary proof, according to the rules of equity. *Ibid.* 381.
40. In an action for a *tert* to personal property, possession, accompanied by an assertion of ownership, is *prima facie* evidence of property. Documentary evidence, is only necessary when the ownership is denied, and the production of papers is called for. *Ibid.* 381.
41. Action on a bill of exchange, by the payee, against the drawer, which had been endorsed to O., and which was by O. endorsed to C. The Court admitted O. to prove that he endorsed the bill to

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- C., merely to recover the money, for the account of the plaintiff, and without consideration. The possession of the bill, by the drawee, is *prima facie* evidence that he has paid all those who could claim against him, on the bill, and the endorser, O., has no interest in the event of the suit. *Lonsdale vs. Brown*, 404.
42. A commission directed to A and B, or either of them, to take depositions, authorizes the deposition of A, to be taken by B. *Ibid.* 404.
43. Action for an infringement of the plaintiff's right to the *hopperboy*, described in his patent.
44. Evidence was allowed on the part of the plaintiff, of his declarations in a particular year, that he had discovered and constructed the machine patented, all the parts of which he described. This evidence was admitted to prove, not that the plaintiff was the discoverer, but that he then asserted such a right, and described the machine. *Beans vs. Hettick*, 408.
45. A witness, who had in use such a machine as that used by the defendant, and who, with other persons sued in similar actions with the present, had contributed a common fund, to defray the expenses of their witnesses in attending to the suits, was allowed to testify on the part of the defendant in this case. Between the contributors there was no agreement to participate in paying the damages or costs, which might be recovered against either of them in the actions. A verdict in this case, would not avoid the plaintiff's patent; and therefore, the witness had no interest in this case. *Ibid.* 408.
46. The counsel for the plaintiff, cannot ask the witness, if Jacob Stouffer had applied to the plaintiff for a license to use his *improved hopperboy*, and had offered to pay for it; it not being proved that Jacob Stouffer had a *hopperboy* of any kind, or had ever used one. *Ibid.* 408.
47. The Court would not allow a witness to depose what he had heard said in the family of Stouffer, as to the *Stouffer* *hopperboy* being so called; it being merely hearsay evidence. *Ibid.* 408.
48. A deposition of a witness residing in this state, above one hundred miles from the place of holding the Court, taken under a rule entered by the plaintiff in the Clerk's Office, but not in conformity with the requisitions of the 30th section of the Judicial Act, cannot be read in evidence. *Ibid.* 408.
49. An examination of the law in relation to the taking of the depositions of witnesses, residing above one hundred miles from the place of holding the Court. *Ibid.* 408.

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50. A deposition having been read without objection, cannot be afterwards rejected and withdrawn, because the Court, subsequently, refused to allow a deposition to be read, on account of an exception which would ~~also~~ have excluded the deposition, which had been read, had it been objected to. *Ibid.* 408.
51. What questions cannot be put to a witness called as rebutting evidence. Interest in a witness, short of that which would exclude him on the ground of incompetency, how far it should weigh. *Ibid.* 408.
52. What a witness (since dead) swore at the former trial of this indictment, may be proved by a person who was present, and heard his testimony; provided he can repeat the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes, taken at the time; or from a newspaper, printed by him, containing the evidence as taken down by himself. *The United States vs. William Wood*, 440.
53. A witness, who uses a machine resembling that of the plaintiff, is not an incompetent witness for the defendant, because the patent of the plaintiff may be defective; as the Court cannot, in the case in which he is offered as a witness, declare the patent void, so as to benefit the witness; although in the case a verdict should be given for the defendant, on the ground that the plaintiff was not the original inventor of the machine. *Evans vs. Eaton*, 443.
54. It is not required, in an action for the proceeds of a forfeiture under the laws of the United States, prohibiting intercourse with foreign nations; that the plaintiffs, who were the officers of a revenue cutter, should produce their commissions. It is sufficient that they prove they acted as officers. *Sawyer et al. vs. Steele*, 464.
55. Wills, 1, 2.
56. The same evidence is necessary to prove the re-publication of a will, as its publication. *Lessee of Musser vs. Curry*, 481.
57. The Act of the Assembly of Pennsylvania, passed in 1815, authorizing the notarial acts of notaries public to be given in evidence, is not obligatory in the Circuit Court of the United States. *Craig vs. Brown*, 503.
58. Partner and Partnership, 3, 4, 5.
59. The deposition of a witness, living out of the state, and more than one hundred miles from the place where the Court is held, cannot be read, unless taken under a commission. *Bleecker vs. Bond*, 529.
60. The certificate of the Register of the Treasury Department, under his hand, that certain receipts, of which copies are annexed, are

EVIDENCE.

- on file in his office; with a certificate of the Secretary of the Treasury, under the seal of that department, that he is the Register; is not evidence. It must appear, not only that the officer who gives the certificate, has the custody of the papers, but that he is authorized by law to certify them; and the Register is not so authorized—a sworn copy should have been produced. *Ibid.* §29.
61. Evidence of conversations, between the supercargo of the plaintiffs' ship, and the defendant, previous to, and leading to the contract, tending to explain or vary it, is improper. *Gilpins vs. Consequa*. 184.
  62. A deposition taken on the direct interrogatories, cannot be read, if the cross interrogatories were not put; and the omission will destroy the deposition, whether it was the act of the commissioners named by either party. *Ibid.* 184.
  63. It is no objection to a deposition, that it is written in English, although the commissioners were Dutchmen; and it does not appear, that there was a sworn interpreter, and that the witnesses were examined upon the cross interrogatories, at the time they answered in chief, but answered them afterwards—or that the clerk of the commissioners was not sworn. *Ibid.* 184.
  64. The plaintiffs may examine witnesses to explain, or contradict, evidence which comes out upon the defendant's examination of witnesses; but not, if in the opening, the plaintiffs had given evidence of the same matter, and the evidence he now offers, is not rendered necessary to repel inferences to be drawn from new testimony given by the defendant. *Ibid.* 184.
  65. Where a testator has given a fee to A, if she should survive his daughter, dying without issue then living, A is not a witness in support of the will. *Harrison vs. Rowan*, 580.
  66. A witness may depose as to what he thought of the testator's sanity, at or about the time the will was made; but not as to what the witness had declared upon the subject to others. *Ibid.* 580.
  67. Upon the cross examination of a witness, he may be asked leading questions, to draw from him a further disclosure than he made upon the principal examination, and in reference to the matter testified about. But not as to other matter. *Ibid.* 580.
  68. The proceedings of the Orphans' Court, upon the offer of a will for probate as to personal property, and the decree of the Prerogative Court refusing the probate, are not evidence upon the issue of *devisavit vel non*; and if the one party read part of a deposition, to show that a witness had contradicted himself, the other side may read the whole, to prove his consistency. *Ibid.* 580.

## EXECUTIONS.

1. It is not upon the supposition of fraud, from the length of time to which indulgence has been granted by the plaintiff, in an execution against the defendant, that a subsequent execution, levied, has been preferred to a prior execution, the proceedings under which, have been suspended by such indulgence. *Berry vs. Smith*, 60.
2. The true reason for the preference given to the subsequent execution levied, is; the end of the execution is to obtain satisfaction of the debt, and when delivered to the officer, it is his duty to proceed immediately for the purpose of obtaining satisfaction.
3. The delivery of the execution, changes the property, and vests it in the sheriff; and his possession is notice to all the world. *Ibid.* 60.
3. If the plaintiff, in an execution, orders the sheriff not to levy, the purpose of the delivery of the execution is defeated, and no change of property takes place. *Ibid.* 60.
4. It is not necessary that the officer remove the property, or that he sell it before a reasonable time; but, if by order of the plaintiff, the property is left with the defendant, the execution has no operation. *Ibid.* 60.
5. There is no difference between a suspension of an execution one day, or for one month or more; the order for any suspension, deprives the act of the officer of all its force, until countermanded; and a second execution, levied in the mean time, if pursued, will take preference of the first. *Aliter*, if the second execution issues after the continuance of the order to the officer not to proceed. *Ibid.* 60.
6. Land, held under a special warrant, may be levied upon under a *scire facias*, and sold under a *venditioni exponas*; but land held under an indestructible warrant, cannot be so levied upon. *Lessee of Lewis vs. Meredith*, 81.
7. It is a fatal objection to an execution, that it issued more than a year and a day after the judgment, without a *scire facias* having been issued to revive the judgment. *Arcarati vs. Fitzsimmons*, 134.
8. It seems, that the Court would not be disposed to aid the plaintiff, in an execution which had been dormant for a considerable time; to the disadvantage of a party having equal equity, although he had been equally negligent. *Ibid.* 134.

## FACTOR.

Agent and principal, *passim*.

## FELONY.

Offences against the laws of the United States, 12.

## FOREIGN ATTACHMENT.

1. Motion to dissolve a foreign attachment. The cause of action, stated in the affidavit, which was made by one Smith, as the agent of the plaintiff's testator, was the non-performance, by the defendant, of the stipulations in a charter party, made with the plaintiff's testator, the owner of a ship; the defendant having refused and wholly renounced the employment of the ship on the voyage described in the contract; by which damages were sustained to a large amount. *Clark's Executors vs. Wilson*, 560.
2. The amount of the plaintiff's claim cannot with propriety be averred or sworn to; and being entirely for unliquidated damages, to determine which no known standard can be referred to; a foreign attachment cannot be sustained. *Ibid.* 560.
3. It is no objection to a foreign attachment, that the plaintiff had sued out an attachment, in another state, for the same cause of action. *Quere.* If the defendant had given bail in the first attachment, whether a second could be sustained. *Ibid.* 560.

## FOREIGN LAWS.

1. The defendant was discharged by the Bankrupt Law of Teneriffe, in 1801. In 1796, a suit was instituted against him and another, in New-York, by *capias*; and a judgment was obtained against him, on the verdict of a jury, in 1797. This suit was instituted upon the judgment, to which he entered the plea of bankruptcy, and a discharge by the laws of Teneriffe, subsequent to the rendition of the judgment. *Green vs. Sarmiento*, 17.
2. To support the plea of bankruptcy in this case, the defendant is bound to show that the contract was originally made at Teneriffe. *Ibid.* 17.
3. The judgment obtained against the defendant in New-York is conclusive, and extinguishes the original contract; and the discharge of the defendant in Teneriffe, is no bar to this action. *Ibid.* 17.

## FORFEITURE.

1. Action of *indebitatus assumpsit*, by the officers of the revenue Duties, of the District of Delaware, for one half of the forfeiture incurred for a violation of the Non-Intercourse Law, by a vessel seized by the collector of Delaware, on the information of the plaintiffs, and by him sent to this District for trial, where she was condemned, and the amount of the forfeiture was received by the defendant, the collector of the port of Philadelphia. *Sawyer et al. vs. Steele*, 464.

## FORFEITURE.

2. The rules prescribed by the laws of the United States, for the distribution of the proceeds of forfeitures. *Ibid.* 464.
3. The information to induce a seizure, need not be as full as the evidence in the case would authorize. It is sufficient if it induced the prosecution. *Ibid.* 464.
4. It is not necessary that the officers of the revenue cutter should, when they give the information, make a claim for a part of the forfeiture; or that they should take any part in the prosecution of the case, to entitle them to a portion of the proceeds. *Ibid.* 464.
5. The consent of the plaintiffs, that the vessel should be sent from the District of Delaware to the District of Pennsylvania; or a disavowal, by them, of having instituted this suit, does not constitute a waiver of their right to their share of the forfeiture. *Ibid.* 464.
6. The defendant is not liable to the plaintiff, for such part of the proceeds of the forfeiture as he had paid over to other officers of the custom-house, for their shares, before notice of the claims of the plaintiff. *Ibid.* 464.

## FRAUD.

1. Action for a return of premium, on the insurance of the cargo of the Margaret, at and from Batavia to Baltimore.  
 Fraud is an answer to an action for a return of premium, not from any merit in the defendant, which justifies him in retaining money, which *ex equo et bono*, is not his, but from the demerit of the plaintiff, which excludes him from the aid of a Court, to draw it out of the defendant's hands. *Schwartz vs. The United States Insurance Company*, 170.
2. The Court is not disposed to make nice distinctions between grades of fraud. The true rule is, that if the insured, by deception and false pretences, induces others to take a risk, which, had the truth been disclosed, they would have refused, or would have taken on different terms, thereby securing to himself a chance to claim an indemnity in case of loss, or a return premium in case of safe arrival; it is such a fraud as ought to defeat his claim to a return of premium. *Ibid.* 170.
3. If the teas selected by A, were afterwards changed, the buyer was at liberty to rescind the contract, and refuse to take the teas, as soon as the fraud was discovered—even at Amsterdam, the place of their sale; and to recover back what had been paid; and also to refuse payment of the note given on the contract, on the ground



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- of a failure in the consideration of the note; or he might affirm the contract, and claim damages. *Cheungwo vs. Jones*, 359.
- \*4. Fraud, and official misconduct, are not to be presumed, but should be proved; and it is not a fraud, or illegal, in a judge, who has presided in the Court in which the judgment was rendered, to purchase property sold under an execution issued upon such judgment. *Lessee of Cooper vs. Galbraith*, 546.

INSOLVENT LAWS.

1. Action on a bill of exchange, drawn 10th of May 1811, by the plaintiff, at St. Barts, on himself in Philadelphia, and by him accepted, and afterwards regularly protested for non-payment. *Golden vs. Prince*, 313.
2. The defendant claimed to be discharged from this debt, by a law of the state of Pennsylvania, passed 13th of March 1812; under which he had received a certificate, having conformed to the provisions of the law; and which law declares, that the certificate shall discharge such insolvent from all debts and demands due from him, or for which he was liable at the date of such certificate; and also, from all contracts originating before the said date, though payable afterwards. *Ibid.* 313.
3. The law of Pennsylvania of 13th of March 1812, is unconstitutional, because it impairs the obligation of a contract; and because Congress have exclusively the power to pass Bankrupt Law. *Ibid.* 313.

INSPECTION LAWS.

The laws of the United States do not require a person, in order to entitle himself to a clearance, to produce to the collector a certificate of his having complied with the Inspection Laws of the state; unless the law of the state requires it. *Bas et al. vs. Steele*, 381.

INSURANCE.

1. The plaintiffs insured 12,000 dollars on the Anna Maria, from Cadiz to Antwerp, by a valued policy; and the vessel having put into Gibraltar in distress, the captain executed a bottomry bond, which was dated a few days before the policy was made. The jury found the real value of the Anna Maria to be 15,000 dollars, and left to the Court the question, whether the amount of the bottomry bond should be deducted from the agreed value in the policy, or the real value. The Court held, that the deduction should

## INSURANCE.

be made from the real value, as found by the jury. *Watson et al. vs. The Insurance Company of North America*, 1.

2. A valued policy is in general conclusive, both as to the value of the property, and of the interest that valuation is sufficient to cover; the agreed value being a fixed standard, by which to ascertain the measure of the promised indemnity; but this ceases to be obligatory, if from any circumstances it fails to afford such standard—as where the loss is partial, or the property has, by fraud or accident, been greatly overrated. *Ibid.* 1.
3. Difference between the form of policies of insurance in the United States and in England, as to double insurances. *Ibid.* 1.
4. Insurance. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and conduct; that the property shall belong to neutrals; that it shall be so documented as to prove its neutrality, and that no act of the insured or his agents shall be done, which can legally compromise its neutrality. *Schwartz vs. The Insurance Company of North America*, 117.
5. The warranty of neutrality is broken, by unneutral conduct in the insured. *Ibid.* 117.
6. It is enough to produce a forfeiture of the indemnity of the insurance, if the risk is varied or increased, by conduct inconsistent with the duties of neutrality. *Ibid.* 117.
7. Abandonment.
8. Warranty, 1.
9. The assured is not bound to communicate the age of the vessel, or where she was built, unless required so to do. It is enough, if he is prepared to vindicate his implied warranty, as to the seaworthiness of the vessel, in case it is questioned. *Poppleton vs. Kitchen*, 139.
10. A misrepresentation, which will avoid a policy, must not only be false, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk, when otherwise he would not have done so. If it had no influence, or ought to have had none, it cannot be said to have been material. *Clason et al. vs. Smith*, 156.
11. The mere expression of an opinion by the assured, or an expectation as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a material misrepresentation. It was

INSURANCE.

- the folly of the assurer, not to have inquired into the grounds of the opinion. *Ibid.* 156.
12. Fraud, 1, 2,
13. Insurance was effected on goods on a voyage at and from Guadeloupe to a port in France, on the Atlantic. The vessel, instead of going direct to France, stopped at Santos two or three days, which was proved to be the safest and most usual route in time of war.  
If the vessel went to Santos with the honest intention to avoid British cruisers, and remained there no longer than was necessary, the deviation was excusable. *Goyon et al. vs. Pleasants*, 241.
14. Insurance on goods on board the brig Betsey, from Cape Henry, to Lisbon. The cargo consisted of corn, corn meal, and navy-bread; and the policy contained the usual memorandum, in which it was stated, that upon certain articles, and among them those insured, the insurer agreed to pay for a total loss only. The brig Betsey was driven on shore, within one or two miles of Lisbon; and the cargo was so injured, that when the part which was taken to Lisbon, was sold, it did not pay the expenses of saving it; and the insured claimed, in this action, for a total loss.  
As to memorandum articles, the insurer agrees to pay for a total loss only; and if the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total; and the insured cannot treat it as a total loss, or demand indemnity for a partial loss. *Marcan vs. The United States Insurance Company*, 256.
15. There is no instance where the insured can demand, as for a total loss, that he might not have declined making an abandonment, and demanded a partial loss. If the property insured, be included within the memorandum in the policy, the insured cannot, under any circumstance, call upon the insurer for a partial loss; and consequently, he cannot elect to turn it into a total loss. *Ibid.* 256.
16. If the trade in which a vessel is to be engaged during the voyage, be contrary to the laws of the country, or the laws of nations, a policy upon the ship equally with one on the cargo, the peculiar subject of interdiction, is void. - *Gray vs. Simms*, 276.
17. The rule; that if the policy once attaches, the right to the premium becomes indefeasible, is not without exceptions. *Ibid.* 276.
18. If a contract of insurance be legal when it is made, and the performance of it is rendered illegal by a subsequent law, both parties

## INSURANCE.

are discharged from its obligations. In such a case, the insured loses his indemnity, and the insurer his premium. *Ibid.* 276.

19. If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage or wear and tear, which, without the action of any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks or the like, these are perils against which the insurer agrees to indemnify. *Coles vs. The Marine Insurance Company*, 159.
20. It is not sufficient for the insured to prove, that there were storms during the voyage, unless he can fairly trace the injury sustained to their influence. *Ibid.* 159.
21. What will be deemed a misrepresentation by the assured. *Ibid.* 159.
22. It is very certain, that every thing which concerns the state of the vessel, at any particular period of her voyage, is generally considered material to the risk. *Ibid.* 159.

## INTEREST.

1. The defendant settled his account at the Treasury Department, in 1808, on which a balance was stated against him. In 1812, he claimed further credits, which were allowed to him, and which reduced the balance claimed from him in 1808. The Court instructed the jury to allow interest on the actual balance, from 1808. *The United States vs. Ormsby*, 195.
2. Where there have been running accounts between parties, and one party has been in the habit of transmitting his accounts regularly to the other, striking a balance, and charging or giving credit for interest, as the balance might be, and no objections have been made to it; and where this mode of stating accounts is shown to be the custom of trade; such manner of charging interest is legal, and will be supported: *Barclay et al. vs. Kennedy et al.* 350.
3. A usage to add interest at the end of the year, to the annual account, and interest on the balance, does not apply in a case in which the commercial intercourse between the two countries in which the parties reside, had ceased, when the account was transmitted; nor will it authorize the creditor to make other rests in the account. *Denniston et al. vs. Imbrie*, 396.
4. If an alien enemy has an agent here, and this is known to the debtor, interest ought not to abate during the war. *Ibid.* 396.

## JUDGMENTS AND DECREES.

1. The Constitution of the United States, intended to vest in Congress

# JUDGMENTS AND DECREES.

the full power to declare the judgments of one state Court conclusive in every other; and the "Act to prescribe the mode in which the public acts, records, and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state," has declared, not that they shall have full power and conclusive effect, but that they shall have *such* effect, in every other state, as they possessed in the state whence they were taken.—*Green vs. Sarmiento*, 17.

2. The plaintiff had filed a bill on the equity side of the Circuit Court of Georgia, against the defendant, in which he sought relief from a judgment obtained against him upon a promissory note drawn by him, claiming that the amount of the note had been paid by the endorser, against whom a suit had been instituted in a state Court in Pennsylvania; and who, having been taken in execution under a *capias ad satisfaciendum*, gave the plaintiff certain securities, (afterwards found of no value,) and was then discharged from the execution. The bill was dismissed in Georgia; and the plaintiff having paid to the defendant the amount of the judgment, instituted this suit to recover the sum paid by him, on the ground, that the discharge of the endorser from the execution, was a satisfaction of the debt. *Montford vs. Hunt*, 28.
3. Held, that the decree of the Circuit Court of Georgia, was conclusive on the plaintiff; the same facts, as those now relied upon, having been before that Court, or which might have been submitted by the plaintiff in the bill, to the consideration of the Court, at the time of the proceeding. *Ibid.* 28.
4. Warrant of attorney.

# JURISDICTION.

Offences against the laws of the United States. 12, 13, 14.

# LANDS AND LAND TITLES.

1. The law of Pennsylvania relative to titles to land under application, warrants, surveys, locations, payment of purchase money, the rules established in the land office, relative thereto, by which such titles are ascertained and determined. *Lessee of Lewis vs. Meredith*, 81.
2. Ejectment. The order of the proprietaries to survey the land in controversy, was dated in August 1773, and the survey was made, and returned into the land office, in October 1774. The defendant claimed title by possession in 1789, and subsequent settlement and improvement. This ejectment was brought in 1805. The

## LANDS AND LAND TITLES.

objection to the plaintiff's title was, that all the lines of the tract had not been run, and that the plaintiff was barred by the Statute of Limitations *Pont's Lease vs. Braham*, 90.

3. The defendant, who appears with no title, except possession and improvement made after the survey, who is a mere intruder on land long before appropriated, is not a person whom the laws of the state favour. *Ibid* 90.
4. An entry and survey do not, in Virginia, convey the legal estate in lands out of the commonwealth. *Jones vs. Backe*, 199.
5. A grant from the Commonwealth of Pennsylvania, passes a *legal possession* to the grantee, which continues until disturbed by an *actual adverse possession*. The title vests in the grantee, upon the return and acceptance of the survey and payment of the purchase money; and the legal possession vests at the same time. *Lease of Potts vs. Gilbert*, 475.

## LAW OF NATIONS.

1. St Domingo, 2, 3.
2. The laws of nations do not prohibit the carrying of enemies' goods in neutral vessels; so far from so doing, upon the condemnation of the goods, the vessel is entitled to freight. *Schwartz vs. The Insurance Company of North America*, 117.
3. But, if a neutral endeavours by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavours to protect; and is a fraud on the neutrality of his own government, and upon the rights of the belligerent. *Ibid* 117.
4. Private armed vessels.
5. Whether a neutral, within the territory of one belligerent, commits a crime against that belligerent by an intercourse with the enemy, must depend on the nature of that intercourse. *Bas et al. vs. Steele*, 381.

## LE LOCI.

1. Contract, 1.
2. By the comity of nations, the laws of a foreign country where a contract is made or discharged, is considered by the tribunals of other nations, as the law of that contract, and they will decide according to such laws. *Golden vs. Prince*, 313.

## LIBEL.

1. No man is at liberty to trifle with the character of another, by pub-

## LIBEL.

lishing charges against him, calculated to bring him into general contempt, and then justify himself by stating his authority, and proving the statements. *The United States vs. Duane et al.* 246.

2. Evidence that the charge was taken from the Journals of Congress, and thus showing that the publishers are not the authors of the scandal, may be given in mitigation of damages. *Ibid.* 246.

## LIMITATIONS.

1. The Act of Limitations did not begin to run, until the plaintiff's lessor was ousted, or adversely kept out. *Pena's Lessee vs. Ingraham*, 90.
2. The meaning of the Act of the Legislature of Pennsylvania, of 26th March 1785, section third, is this:—If, at the time the law passed, a person was disseised, he was bound to bring his ejectment within fifteen years. But if he was afterwards disseised, the Act of Limitations, which would begin to run, would not be a bar in less than twenty-one years. *Ibid.* 90.
3. Where a subsequent promise, or acknowledgment of a debt is made, it may be given in evidence, to remove the bar of the Statute of Limitations; although the action be brought upon the original cause of action. But if the new promise, vary the terms of the original contract, on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence. *Lonsdale vs. Brown*, 404.
4. The Statute of Limitations, of Pennsylvania, is substantially the same as that of 21st James I. ch. 16. The limitation begins to run from the time of an actual adverse possession, and not before. *Lessee of Potts vs. Gilbert*, 475.
5. Adverse possession must continue, in point of locality, during the twenty-one years. A possession of part of a tract of land, short of twenty-one years, cannot be joined to a possession of another part, so as to make up the period. The possession of different intruders, in succession, upon the same part of the tract, cannot be added together by the last intruder, so as to make up twenty-one years of adverse possession against the real owner. *Ibid.* 475.
6. The possession of the disseisor, to bar the plaintiff, can never extend beyond the limits of the particular spot upon which he is seated; and the legal possession of the owner continues unaffected as to the residue of the tract, by such tortious possession; and his legal possession revives, the moment the intruder quits the part of the tract he may have occupied. *Ibid.* 475.

## LIMITATIONS.

7. A sale, by one intruder to another, without an exact definition of the property conveyed, will not aid the purchaser in establishing a continued adverse possession. *Semble*. That an intruder, who has not had twenty-one years' possession, has no title to convey. *Ibid.* 475.

## MALICIOUS PROSECUTION.

1. Action for damages for a malicious prosecution—1. In charging the plaintiff with having stolen certain articles used in the manufacture of gunpowder, and causing the plaintiff to be imprisoned thereon. 2. In bringing a civil action against the plaintiff, and demanding excessive bail. 3. In causing the plaintiff to be indicted in the state of Delaware, as the receiver of certain articles used in making gunpowder, knowing them to have been stolen; all of which charges were alleged to have been maliciously made, and without probable cause. *Munns vs. Dupont et al.* 31.
2. Of the malice of a charge which is the ground of a prosecution for a crime, the jury are exclusively the judges. Probable cause for such a prosecution, is a mixed question of law and fact. What circumstances are sufficient to prove a probable cause, must be decided by the Court; but to the jury it must be left to decide, whether these circumstances are proved by credible testimony. *Ibid.* 31.
3. Probable cause, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused was guilty. *Ibid.* 31.

## MARINERS' WAGES.

1. Libel for mariners' wages. Palmer stated in his libel, that he had shipped and signed articles for a certain voyage; and was forcibly expelled from the vessel during the voyage, without cause. The answer denied the allegations in the libel, and charged the mariner with mutiny, &c. *Wilcocks vs. Palmer*, 248.
2. To entitle the appellee to wages, he must not only produce the shipping articles, but must prove he performed the voyage, or show a legal cause for not having done so. *Ibid.* 248.

## MASTER OF A VESSEL.

1. The master of a vessel while at sea, has authority to do acts which, on land, would not be justified. *The United States vs. Wiltberger*, 515.



MASTER OF A VESSEL.

2. The master of a vessel has an absolute authority on board the vessel, under his command, and his lawful orders must be obeyed. He may inflict moderate correction for disobedience, and impertinent language or behaviour. The seaman may endeavour to escape from it; and if he is exposed, and is otherwise exposed, to a repetition of such treatment, he may resist for the mere purpose of protecting himself from injury. *The United States vs. Smith et al.* 525.
3. If the master use an unlawful weapon, or the seaman is exposed to danger of his life, or limbs, he may resort to any necessary species of defence to avoid this danger. *Ibid.* 525.
4. If the master strikes the seaman, and is seized by him, and is so firmly held, as that he cannot extricate himself, the seaman is guilty of confining the captain. *Ibid.* 525.

MURDER.

Offences against the Laws of the United States, 11, 12, 13, 14.

NEUTRALITY.

Warranty, 2.

NEW TRIAL.

The Court refused to grant a new trial, where the evidence submitted to the jury, and upon which their verdict was founded, was such as it was peculiarly their right to decide upon; and also, where the construction given by the jury to the evidence, appeared to be consistent with the justice of the case. *Blagg vs. The Phoenix Insurance Company*, 58.

NON-INTERCOURSE LAWS.

1. The prohibited articles, the importation or the putting on board of which, with intent to import the same, is made a cause of forfeiture by the 5th section of the Act of 1st March 1809, are, as well those which are prohibited on account of the place at which they were laden, as those which are the growth, produce, or manufacture, of the offending nation. *The United States vs. The Nancy et al.* 281.
2. Although the merchandise, which is the subject of this information, was landed, and the duties paid thereon, at Amelia Island, in Florida, and thence trans-shipped to Philadelphia—yet, as the goods were originally put on board the vessel, with intention to import them into the United States, no question can arise as to the con-

## NON-INTERCOURSE LAWS.

tinuity of the voyage; the offence under the law consisting, not in the importation, but in the intention with which the merchandise was put on board. *Ibid.* 281.

3. The Non-Importation Law of 2d March 1811, which revived the Act of 1st March 1809, the provisions of which extended to the *possessions*, as well as the colonies and dependencies, of Great Britain, did not extend to the *possessions*, but only to the *colonies* and *dependencies* of that power. Malta was not a dependency of Great Britain. *Ibid.* 281.

## OBSTRUCTION OF PROCESS.

1. Indictment for resisting the marshal of the United States, in the execution of a warrant issued by the Judge of the District Court of the United States. *The United States vs. Luskins*, 335.
2. The 22d section of the Act of Congress, passed on the 30th day of April 1790, for the punishment of certain crimes, includes every species of process, legal and judicial, whether issued by the Court in session, or by a Judge or magistrate, acting in that capacity out of Court, in the execution of the laws of the United States. *Ibid.* 335.
3. On a count in the indictment, for resisting the officer of the United States, it is not necessary that the person resisting should use or threaten violence. *Ibid.* 335.

## OFFENCES AGAINST THE LAWS OF THE UNITED STATES.

1. Indictment, for an illegal augmentation of the force of a French privateer, by raising or otherwise altering the gun carriages.

The offence consists, in increasing, or augmenting, (or being concerned in so doing,) the *force* of any belligerent vessel, which was armed at the time of her arrival in the United States, by adding to the number or size of her guns prepared for use, or by the addition to her force, of any equipment solely applicable to war.

Raising or lowering the carriages, or cutting away the decayed wood in them, and replacing them with sound wood, by which they are rendered fit for use, is increasing the force of the vessel, by an equipment solely applicable to war, and is expressly within the words and meaning of the Act of Congress. *The United States vs. Grassin*, 65.

2. Indictment against the defendants, part of the crew of the vessel. First count, for confining the master; and the second count, for

OFFENCES AGAINST THE LAWS OF THE UNITED STATES.

- endeavouring to make a revolt in the ship ; both charged to have been committed on the high seas. *The United States vs. Smith et al.* 78.
  3. *It seems*, that to constitute the offence of endeavouring to make a revolt, the attack on the master should be accompanied by some evidence, indicating, on the part of the assailants, an intention to take possession of the vessel. *Ibid.* 78.
  4. Any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law. *Ibid.* 78.
  5. The offences charged against the defendants, were committed whilst the vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about one mile and a half wide at the mouth ; and the Court were of opinion, that they had jurisdiction of the case. *Ibid.* 78.
  6. Indictment against the defendant, as mate of the *Lucy*, he not being owner, for casting away and destroying the vessel, on the high seas, the *Lucy* being the property of Augustus Masol, a citizen of the United States. *The United States vs. Varanant*, 146.
  7. In any case, more particularly in one which is capital, the circumstances relied upon to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact ; and they should be consistent with themselves, each circumstance tending to establish the guilt of the accused. *Ibid.* 146.
  8. What amounts to a casting away, was decided in the case of the *United States vs. Johns*, (vol. i. p. 363,) in this Court. *Ibid.* 146.
  9. This case is within the provisions of the first section of the Act of Congress, passed 26th March 1804. *Ibid.* 146.
  10. Obstruction of process, 1, 2, 3.
  11. Indictment for aiding and assisting in the robbery of the mail ; putting the life of the carrier in jeopardy, by means of dangerous weapons ; and for robbing the mail.
- Upon an indictment for robbing the mail, and putting the life of the mail-carrier in jeopardy ; a sword and pistol, in the hand of the robber, by terror of which the robbery is effected, is a dangerous weapon, within the law ; although the sword be not drawn, and the pistol be not pointed. It is not necessary to prove, that the pistol was charged ; it is presumed to be so, until the contrary is proved. *The United States vs. William Wood*, 440.

## OFFENCES AGAINST THE LAWS OF THE UNITED STATES.

12. Indictment for manslaughter committed by the master of an American merchant ship, on a seaman, in the river off Wampoa in China. *The United States vs. Willberger*, 515.
  13. A man may oppose force to force in defence of himself, his family, or property, against one who manifestly endeavours, by surprise or violence, to commit a felony. The intent of the person resisted, must be to commit a felony, or the killing will not be justified. *Ibid.* 515.
  14. No words or gestures, however irritating, will justify the killing; although they may reduce the offence from murder to manslaughter. *Ibid.* 515.
  15. The intent to commit the felony must be apparent—the damage must be imminent, and the resistance used necessary to avert the damage. *Ibid.* 515.
  16. The prosecutor must prove, that the blows caused the death; but if he proves that the blows were given by a dangerous weapon—were followed by ineffability or other alarming symptoms, and soon afterwards by death; this is sufficient to impose it on the accused, to show that the death was occasioned by some other cause. *Ibid.* 515.
- Query*, Whether this offence, which was committed on a river, was within the jurisdiction of the Circuit Court of the United States, according to the provisions of the Act of Congress. *Ibid.* 515.

## OLIVER EVANS.

1. Oliver Evans's patent for the improved hopperboy, is not an exception from the general law, either by force of the private Act, under which the patent was granted, or the decision of the Supreme Court, in the case of *Evans vs. Eaton*. *Evans vs. Hettick*, 408.
2. Oliver Evans's patent is not for the whole hopperboy,—whether he was the original inventor of it or not; nor does the opinion of the Supreme Court, in *Evans vs. Eaton*, sanction such a claim. *Ibid.* 408.
3. Unless Oliver Evans shows himself to be the original inventor of the hopperboy, he can claim no right in virtue of the grant made to him by the Act of Assembly of Pennsylvania, passed in 1787. *Ibid.* 408.

## PARTNER AND PARTNERSHIP.

1. Although one partner is not bound, singly, to pay a debt due from

PARTNER AND PARTNERSHIP.

him and his partner, if, when sued, he plead in abatement, the omission to join his partner in the action; yet he is not entitled to recover in his own name a partnership debt; and if he sue in his own name, the defendant may take advantage of it on the trial on the general issue. *Jordan vs. Wilkins*, 110.

2. B. & I., partners, being indebted to the United States for duties, B. executed a bond for the debt, in his separate name. B. & I. afterwards made a voluntary assignment of their property to the defendants, for the use of their creditors; and B. assigned his estate, for the use of his separate creditors. Before the bond was given, B. & I. authorized, in writing, each to execute custom-house bonds for duties,—each one of the partners agreeing to be bound for the payment of the bonds, as if executed by both. This action was instituted, (*indebitatus assumpsit*), against the assignees of B. & I., to recover from them the amount of the bond given by B. to the United States, out of the partnership effects of B. and I. *The United States vs. Astley et al.* 508.
3. The bond is not evidence of a debt due by B. & I., because not signed by them; nor of a debt due by I., because not signed by him. *Ibid.* 508.
4. One partner cannot, by deed, bind his co-partner; unless executed in his presence, and by his consent. *Ibid.* 508.
5. Although B. & I. were bound, on the importation of the goods, for the duties on the goods, yet the bond of B. is not admissible in evidence, to prove the amount of those duties; because the bond, although given by one partner, extinguished the debt for which it was given, and made it the separate debt of B. *Ibid.* 508.

PATENT LAWS AND PATENT RIGHTS.

1. Action for an infringement of the plaintiff's patent-right to alarm bells for fire engines. The defendants opposed the claim, because the plaintiff had given the use of his invention to the Philadelphia fire company—that the invention is not an alarm-bell, as mentioned in the patent, nor a hose or fire engine—that their bells differ in principle with the plaintiff's. *Park vs. Little et al.* 196.
2. The plaintiff, not having assigned the whole of his title and interest in the invention, and no deed of assignment being recorded in the office of the Secretary of State, may recover, notwithstanding any agreement to assign. *Ibid.* 196.
3. The question, whether the invention is new, will be decided, not by the fact that bells are not new, but whether the mode of ring-

## PATENT LAWS AND PATENT RIGHTS.

ing them, by the motion of the engine, and not by manual action, is new. *Ibid.* 196.

4. The thing for which the patent is granted should be truly and fully described in the specification. The matters not disclosed must appear to have been concealed for the purpose of deceiving the public. *Ibid.* 196.
5. If an invention is an improvement in the principle of a machine for which a patent has been granted, it is not a violation of the patent;—if it is an improvement in the form, it is such a violation. *Ibid.* 196.
6. The plaintiff cannot object to the originality or priority and use of another machine, alleged to have been similar to his own, on the ground that it had gone into disuse, or was not notoriously in use; since it is essential to his case, to prove he was the original inventor of the machine for which he has a patent. *Evans vs. Hettick*, 408.
7. If the patent and specification do not state in what the improvement consists, in full, clear, and exact terms, where the patent has been granted for an improvement, the plaintiff cannot recover for an alleged violation of it. *Ibid.* 408.
8. If two machines be substantially the same, and operate in the same manner, to produce the same result, though they differ in form, proportions, and utility, they are the same in principle; and the one last discovered, can have no other merit, than to be an improvement of the other; but for which the inventor can obtain no patent. If the improvement be in the principle, a patent may be obtained for the improvement. *Evans vs. Eaton*, 443.
9. To the validity of a patent for an improvement, it is necessary to state, in the specification, in what the improvement consists. *Ibid.* 443.

## PERILS OF THE SEA.

Embargo and Embargo Laws, 1, 2, 3.

## PIRACY.

1. The defendant, who was the first lieutenant of an American privateer, the *Revenge*, was indicted for piracy committed upon a Portuguese vessel, and for assaulting the Portuguese captain and the crew, and putting them in bodily fear, &c. The defendant was charged with boarding the vessel, and by force and intimidation, taking from her money and other articles, not claiming the vessel as prize, but pretending that the *Revenge* was an English vessel, and that the articles would be paid for, by an order on the English Consul.

## PIRACY.

The 8th section of the Act of Congress, makes *murder* and *robbery* on the high seas, acts of piracy. The words "which, if committed in the body of a county," do not relate to "murder" and "robbery," but to the words immediately preceding them, "or any other offence." *The United States vs. Jones*, 209.

2. To define the meaning of the term "robbery," the Common Law must be resorted to. Whenever a statute of the United States uses a technical term, which is known, and its meaning clearly ascertained by the Common or Civil Law, from one or other of which it is obviously borrowed, it is proper to refer to the source from which it is taken, for its meaning.

The Act of Congress of 26th June 1812, does not repeal the provisions of the law relating to piracy. *Ibid.* 209.

3. Robbery is the felonious taking of goods from the person of another, or, in *his presence*, by violence, or by putting him in fear, and against his will. *Ibid.* 209.
4. The general rule of law, that robbery on the high seas is piracy, has no exception or qualification in favour of commissioned privateers, in any Act of Congress, in the Common Law, or in the law of nations. *Ibid.* 209.
5. The law for the better government of the navy, which enjoins on inferior officers and privates, the duty of obedience to their superiors, speaks of the *lawful orders* of the superiors. *Ibid.* 209.
6. Indictment for piracy committed on a Spanish vessel by the defendants, the first lieutenant and subaltern officers of the American privateer *Revenge*. *The United States vs. Jones et al.* 228.
7. As there is no proof that in the first instance any unlawful acts were meditated by the commander of the *Revenge* and his officers, it will not be sufficient to prove acts of robbery committed by him and his crew generally—it must be proved that the defendants participated in the taking, and that they did it feloniously. *Ibid.* 228.
8. The jury should be satisfied, if they believe that the defendants participated in the taking of the property from on board the Spanish vessel, that they knew, or might have known, at the time of capture, that robbery, and not capture as prize, was contemplated. *Ibid.* 228.
9. The captain of the *Revenge* may have been guilty of robbery, and those who executed his orders be innocent. *Ibid.* 228.
10. The crimes of piracy mentioned in the 8th section of the Act for the punishment of certain crimes, passed 30th of April 1790, are

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such as are committed by citizens of the United States, or on board of vessels of the United States; and therefore, the 10th and 11th sections, as to accessories, refer to the acts of piracy mentioned in the 8th section. *The United States vs. Howard et al.* 340.

11. A confederacy by citizens on land, or on board of an American vessel, with sea robbers or pirates, by the laws of nations; or the yielding up of a vessel by a citizen to such pirates, is within the provisions of the 8th section of the Act of Congress. *Ibid.* 340.
12. An endeavour by a mariner to corrupt the master of the vessel, and to induce him to go over to pirates, is within the provisions of the 8th section of the law. *Ibid.* 340.
13. To establish the crime of confederacy, there must be some proof of criminal intentions in the person charged. *Ibid.* 340.
14. The language of the 12th section of the law implies, compact and association with the pirates, as well in relation to the past, as to the future. Any intercourse with them, which is calculated to promote their views, is within the provisions of the law. *Ibid.* 340.

## PLEAS AND PLEADINGS.

1. Partner and Partnership, 1.
2. Debt on bond, conditioned to deliver to the plaintiff or his agent, in B., a quantity of whiskey, in all the month of May 1809. Plea, that in all the month of May 1809, the defendant was ready and willing to deliver to the plaintiff or to his agent, at the place of embarkation in B., the whiskey, according to the condition of the bond; but the plaintiff, or his agent, was not then and there ready to accept the same. *Savary vs. Goe*, 140.
3. The rule of law is, that if the condition of the bond is not parcel of the obligation, as if the latter be a money penalty, and the former be to do some act, as to deliver goods, &c., it is not necessary for the defendant to plead *uncorrupt*. *Ibid.* 140.
4. The rules of pleading require, that the plea should be direct in stating with sufficient precision the matter of defence, and not leave it to be found out by inference, however strong. *Ibid.* 140.
5. In actions of contract, or tort, damages, which materially and necessarily arise from the breach or gravamen, need not be stated; as they are covered by the general damages laid in the declaration. Special damages, not necessarily implied, cannot be recovered, unless specially stated; and although the plaintiff has given evidence of special damages, without objection, by the defendant, yet the defendant may object to their allowance, on the trial. *Bee et al. vs. Steele*, 381.



## PLEAS AND PLEADINGS.

6. A variance in pleading, which would be fatal at Common Law, may not be so in Courts which proceed according to the Civil Law ; as the rules which govern the former Courts, are seldom applicable to proceedings in the latter. *Crawford et al. vs. The William Penn*, 484.
7. The Court, proceeding under the Civil Law, will not allow a party to be surprised by evidence, materially variant from the case stated in the pleadings, but will allow an amendment ; yet, if the statement of the case be not such, as can mislead the party, the Court will proceed to a decree. *Ibid.* 484.
8. A demurrer in a case proceeded on, under the Civil Law, does not prevent the party, who demurred, controverting the facts confessed in the demurrer, and compelling the opposite party to prove them. *Ibid.* 484.
9. Rules of pleading, in Courts of Common Law, how far applicable in Courts proceeding according to the Civil Law. *Ibid.* 484.

## PRACTICE.

1. Partner and Partnership, 1.
2. Motion to take out of Court money levied by the marshal, to satisfy a judgment obtained by the plaintiff against the defendant, on the ground of priority, under a judgment obtained in the Court of the state of Pennsylvania, in favour of William Lewis Esqr. who made the motion. *Azcarati vs. Fitzsimmons*, 134.
3. Although the remedy by motion, to take money out of Court, in a case of this kind, is not the only one the party has, yet, as it decides the rights of the parties in a summary way, it is convenient to all ; but the Court will take care, that the party who shall be authorized to take the money, is entitled to it, under a regular execution, and under which the proceedings have been regular. If irregularities appear, sufficient to set aside the execution, the party must resort to his suit at law against the officer. *Ibid.* 134.
4. Executions, 7, 8.
5. Motion for a rule to show cause why execution shall not be stayed—the defendant claiming that he is entitled to further credits from the United States, which will reduce the amount of the judgment confessed in their favour. *The United States vs. Wells*, 245.
6. The Court will not even grant a rule to show cause why the motion shall not be granted, unless upon affidavit, stating precisely what credits are claimed, and the nature of them. *Ibid.* 245.
7. Where an issue of "*devisavit vel non*" is directed out of Chancery, in England, the practice is, for the Judge who tried the cause to return, with the verdict, his notes ; and if the Chancellor is dis-

## PRACTICE.

satisfied, on the ground of the admission of improper evidence, or the rejection of what was proper, or for other reasons, he will direct a new trial; but no exception can be taken, at *Nisi Prius*, to the opinion of the Judge who tried the cause. In the Circuit Courts of the United States, if the Court is supposed to have erred in any of these particulars, the proper mode is to move the Court, sitting in equity, for a new trial. *Harrison vs. Rowan*, 590.

## PREMIUM OF INSURANCE.

Fraud, 1, 2.

## PRINCIPAL AND ACCESSARY.

Crimes, 1.

## PRIVATE ARMED VESSELS.

1. *Libels* were filed in the District Court, in order to make the owners of the privateer *Revenge* answer in damages, for the injury sustained by the owners of the Portuguese and Spanish vessels, for piratical acts of the officers and crew of the *Revenge*, and for which they had been indicted in the Circuit Court, (*ante*, pages 209. 224. 228.) The question, in these cases, was, whether the owners of a commissioned privateer are liable, civilly, for piratical acts committed by the officers and crew of their vessel. *Dias et al. vs. Privateer Revenge*, 262.
2. To a certain extent, a privateer is a national vessel, and forms a part of the national force. *Ibid.* 262.
3. Provisions of the laws of the United States, relative to commissions to be granted to privateers; the powers which are derived from such commissions; and the obligations and responsibilities of the owners and commanders of such vessels, under the law. *Ibid.* 262.
4. For the conduct of the officers and crew, in the execution of the business in which they may be employed, the owners are, by the maritime law, liable; if through ignorance, or illegally, they do an injury to others. *Ibid.* 262.
5. But if the master exceed his authority, and violate his orders, and is guilty of faults or crimes to the injury of others, acting in some business different from that for which he was employed, the owner is not liable. *Ibid.* 262.
6. To warrant the conclusion that the owners of the privateer are liable for injuries done by the master and crew, there must be a capture as prize of war; but in a piratical unauthorized seizure and spoliation, these acts not being in the business of the expedition, the

**PRIVATE ARMED VESSELS.**

owners are not liable beyond the penalty of the bond given according to law, and the loss of their vessel. *Ibid.* 262.

**PROCESS.**

Obstruction of process.

**PROMISSORY NOTE.**

1. Action upon a promissory note, endorsed by the defendant to the plaintiff. On the day the note became due, it was protested; and notice of its non payment was left at the boarding-house of Mrs. H., where the defendant was reported to reside. At the time of the drawing of the note, and for some time afterwards, the defendant continued to reside at Mrs. H's; but before it became due, he went to New-York, without the knowledge of the plaintiff, and embarked for Europe. The notice left at Mrs. H's, was, under all the circumstances, sufficient. *MP Murtrie vs. Jones*, 206.
2. Generally, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used. *Ibid.* 206.

**REVOLT.**

Offences against the laws of the United States, 3.

**ROBBERY.**

Piracy, 2, 3.

**SAINT DOMINGO.**

1. The island of St. Domingo is a dependence of France, and within the Act of Congress of March 1st 1809. *Clark vs. The United States*, 101.
2. It is for the government of the United States to decide, whether this island is independent or not; and until such a declaration is made, or France shall relinquish her claim, the Courts of the United States must consider the ancient state of things as remaining unaltered, and the sovereign power of France over the country as still existing. *Ibid.* 101.
3. The surrender of a town to an invading enemy, does not divest the sovereign of more country than that which has submitted to the conqueror. If the whole island of St. Domingo had been conquered by the British, and given up to the Blacks, the right of France would have revived; since the conqueror gains nothing but the temporary right of possession and government, until a pa-

## SAINT DOMINGO.

cification ; and cannot, in the mean time, impair, by any transfer, the rights of the former sovereign. *Ibid.* 101.

## SALE.

1. Action to recover the stipulated price of a quantity of looking-glass, which the plaintiff advertised as white glass of a superior quality, and which the defendants purchased, after having particularly examined the same ; signing an agreement stating the purchase, and the price to be paid on taking the glass away. On the following day, one of the defendants returned, re-examined the glass, and said it was of inferior quality, and refused to comply with the agreement of the preceding day. The glass was, in fact, of very inferior quality.

The Court held, that the defendant, having examined the glass, and given the agreement to purchase it, he could not afterwards claim to be relieved from his bargain, by the discovery that the quality of the glass was inferior, and that it was not worth the price agreed to be paid for it. *Calhoun vs. Vecchio*, 165.

2. The statement of the quality of the glass in the advertisement, did not amount to a warranty ; inasmuch, as the defendants did not rely upon the advertisement, but on their own judgment, formed after an examination. *Ibid.* 165.
3. Upon a Canton contract to deliver teas, the quality of the sample chests to be selected by A ; if A select and accept of chests of an inferior quality, in performance of the contract, there is an end to the warranty ; and the Hong merchant could only be liable for a fraud, in imposing on the defendant teas apparently of a particular quality, but actually inferior. He could not be bound to deliver the selected teas, which might be very inferior, and bound also to deliver teas of a better quality. *Cheongwo vs. Jones*, 359.

## SALVAGE.

1. If an officer, acting as such, exceeds the bounds of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage. *The Case of Le Tigre*, 567.
2. It is no objection to a claim for salvage, that the interference or assistance of the salvor, did not arise from a desire to preserve the property, or benefit the owner. *Ibid.* 567.

## SEIZURE.

A mere intention to smuggle goods, will not authorize the seizure of a vessel. *The Case of Le Tigre*, 567.

## SET-OFF.

1. The defendant cannot plead a foreign attachment, levied by him in his own hands, in bar to an action against him, by the defendant in the attachment, so as to set off damages against the plaintiff; he must plead the attachment in abatement. If judgment be obtained in the attachment levied in his hands, he may offset the amount. *Cheongtoo vs. Jones*, 359.
2. In an action upon a promissory note, where the plea is *non assumpsit*, the defendant cannot give evidence of damages sustained by a breach of the contract upon which the note was given. *Ibid.* 359.

## SHERIFF'S SALES.

1. The sheriff is empowered, by law, to convey to the purchaser under an execution, all the right, title, and interest of the defendant; and he acts as the defendant's attorney, appointed by law to sell and convey the land. *Lessee of Cooper vs. Galbraith*, 546.
2. In an ejectment, by the purchaser at a sheriff's sale, against the defendant in the execution, or those who may claim under him, the plaintiff need not show any other title than the judgment, execution, and the sheriff's deed; and this title the defendant cannot controvert. *Ibid.* 546.
3. Inadequacy of consideration is no objection to a sale made under an execution; provided the sale was legally and fairly made. *Ibid.* 546.

## STATUTE OF LIMITATIONS.

Limitations, 1, 2.

## SURVEYS.

In Pennsylvania, in 1784, and long afterwards, there was no positive law requiring the surveyor to make an actual survey, by running and marking all the lines;—if, from old lines and natural boundaries, the necessity to run all the lines did not exist, no objection could legally be made to the survey. *Penn's Lessee vs. Ingham*, 90.

## TRADING WITH THE ENEMY.

If trading with the enemy be cause of condemnation, which it clearly is, *a fortiori* carrying despatches to the enemy, by an American vessel, in time of war, is so. It is more criminal, because more useful to the enemy, and more injurious to this country. The citizen makes himself, *pro hac vice*, an enemy, and his vessel enemies' property, and renders himself liable to prosecution as a traitor, or as guilty of a misdemeanor, as the case may be. *The Case of The Tulip*, 181.

## TREASON.

1. Indictment for treason, in adhering to the enemy ; charging the defendant, *inter alia*, with going from the British squadron to the state of Delaware, with intention to procure provisions for the squadron.

The going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason ; as this conduct rested in intention, which is not punishable by our laws. *The United States vs. Pryor*; 234.

2. *Aliter*, if a person has carried provisions towards the enemy, with intent to supply him, though that intention should be defeated. *Ibid.* 234.
3. If the intention of the defendant had been to procure provisions for the enemy, by uniting with him in hostilities against the citizens of the United States, his progressing towards the shore would have been an overt act of adhering to the enemy, though no other act was committed. *Ibid.* 234.

## TREASURY DEPARTMENT.

1. Debt on a bond, dated 19th of July 1797, given by Michael Hillegas and others, to the United States, conditioned that Nichols, who had been appointed, in 1790, a collector of the internal revenue in the district of Pennsylvania, shall faithfully execute the office of collector of the internal revenue, and will account for, and pay over, what moneys he shall collect. *The United States vs. The Administrators of Hillegas*, 70.
2. A balance became due by Nichols to the United States, and, without the knowledge of the sureties in his official bond, he gave to the United States, bonds and mortgages, to secure the payment of the same, which were approved by the proper officers of the Treasury, and by which the amount due to the United States, was agreed to be paid in six, twelve, and fifteen months ; one of which bonds was paid, and others were put in suit, by the District Attorney of the United States. *Ibid.* 70.
3. The United States, in their political capacity, are a collective invisible body, and can only act by their officers, who constitutionally and legally administer the government, and by the agents duly appointed by them. *Ibid.* 70.
4. The Secretary of the Treasury, is the head of the Treasury Department, having the general direction, superintendence, and management, of the revenues of the United States, and the collection thereof. *Ibid.* 70.

## TRUST AND TRUSTEE.

Under the equity of the Act of Assembly of Pennsylvania, which allows commissions to executors, trustees are entitled to claim them.

*Quere*, if trustees are so entitled, by the general rules of Courts of Chancery. *Prevost vs. Gratz*, 434.

## UNITED STATES.

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## USAGE.

What is called the custom or usage of trade, is the law of that trade; and to make it at all obligatory, it must be ancient, so as to be generally known, certain, and reasonable. A usage, of so doubtful authority, as to be known only to a few, and where merchants in the trade differ as to its existence, can never be regarded. *Collings vs. Hope*, 149.

## VARIANCE.

Civil Law.

## WARRANT OF ATTORNEY.

A judgment having been once entered on a warrant of attorney, the warrant becomes *functus officio*; and although in the warrant, authority may have been given to enter *judgments*, in the plural, that can only mean a second judgment, where the first has been set aside; and not as authority to enter two judgments subsisting at the same time. *Fairchild vs. Camac*, 558.

## WARRANTY.

1. Where a seizure is made within the territories of a foreign government, on account of illicit trade, it cannot be said the warranty is not broken, because the seizure was not made before the vessel arrived at her port of destination, or before she had an opportunity to do some act amounting to an actual trading. *Smith et al. vs. The Delaware Insurance Company*, 127.
2. In a case of a warranty of *neutrality* only, the parties have a view to the laws of nations, and subsisting treaties; and the insured only engages that the property is neutral, for the purpose of being protected; and in fulfilling this engagement, the insured can never

## WARRANTY.

be surprised by the want of all proper documents, except by his own neglect or fault. *Ibid.* 127.

3. A warrant against *illicit or prohibited trade*, has a view to the municipal laws and ordinances of the country, where the trade is to be carried on; and foreigners going there, are bound to know and to observe those laws. The warranty amounts to a stipulation, that the trade in which the insured shall engage, shall be lawful to the purpose of protecting the property insured, and that it shall not become unlawful by the misconduct or neglect of the insured.—*Ibid.* 127.

## WILLS AND TESTAMENTS.

1. By the laws of Pennsylvania, the Register of Wills is authorized to take the Probate of Wills, copies of which, with the wills, under his seal, are declared to be matters of record and good evidence. This authority extends to re-published wills and codicils, which, in reference to after acquired lands, are as new wills. *Lessee of Musser vs. Curry*, 481.
2. The same evidence is necessary to prove a re-publication, as a publication; and proof of such re-publication by one witness, will not be sufficient. *Ibid.* 481.
3. It is not necessary for the devisee to prove, that the will was read to the testator in the presence of the witnesses. In general, this is to be presumed; but if the testator was blind, or incapable of reading; or if a reasonable ground be laid for believing it was not read to him; or that there was fraud in the transaction; it is necessary for the devisee to satisfy the jury that the will was so read, or that the contents were known to the testator. *Harrison vs. Rowan*, 580.
4. The testator should appear to have had a sound disposing mind and memory; that is, that he was capable of making his will, with an understanding of what he was doing. *Ibid.* 580.
5. A man may be capable of disposing by will, and yet incapable to make a contract, or to manage his estate. The question is as to competency when the will was made, though evidence of acts and sayings before is always admitted. *Ibid.* 580.





